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SENATE

REPORT
100-140

AMENDING THE NATIVE AMERICAN PROGRAMS ACT OF 1974 TO AUTHORIZE APPROPRIATIONS FOR FISCAL YEARS 1987 THROUGH 1991

AUGUST 3 (legislative day, JUNE 23), 1987.—Ordered to be printed

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Mr. INOUYE, from the Select Committee on Indian Affairs, submitted the following

REPORT

[To accompany S. 887]

The Select Committee on Indian Affairs, to which was referred the bill (S. 887) to extend the authorization of appropriations for and to strengthen the provisions of the Older Americans Act of 1965, and for other purposes, having considered the same, reports favorably thereon with amendments and recommends that the bill as amended do pass.

The amendments are as follows:

TITLE V—NATIVE AMERICAN PROGRAMS

SHORT TITLE

SEC. 501. This title may be cited as the "Native American Programs Amendments Act of 1987".

REVIEW OF APPLICATIONS FOR ASSISTANCE

SEC. 502. The Native American Programs Act of 1974 (42 U.S.C. 2991-2992d) is amended—

(1) in the first sentence of section 803(a) by inserting ", on a single year or multiyear basis," after "financial assistance",

(2) by redesignating sections 813 and 814 as sections 815 and 816, respectively,

(3) by redesignating sections 806 through 812, as sections 807 through 813, respectively, and

S413-5

(4) by inserting after section 805 the following new section:

"PANEL REVIEW OF APPLICATIONS FOR ASSISTANCE

"SEC. 806. (a)(1) The Secretary shall establish a formal panel review process for purposes of—

"(A) evaluating applications for financial assistance under sections 803 and 805, and

"(B) determining the relative merits of the projects for which such assistance is requested.

"(2) Members of review panels established under paragraph (1) shall be appointed by the Secretary from among individuals who are not officers or employees of the Administration for Native Americans. In making appointments to such panels, the Secretary shall give preference to American Indians, Hawaiian Natives, and Alaskan Natives.

"(b) Each review panel established under subsection (a)(1) that reviews any application for financial assistance shall—

"(1) determine the merit of each project described in such application;

"(2) rank such application with respect to all other applications it reviews for the fiscal year involved, according to the relative merit of all of the projects that are described in such application and for which financial assistance is requested; and

"(3) submit to the Secretary a list that identifies all applications reviewed by such panel and arranges such applications according to rank determined under paragraph (2).

"(c) Upon the request of the chairman of the Select Committee on Indian Affairs of the Senate or of the chairman of the Committee on Education and Labor of the House of Representatives made with respect to any application for financial assistance under section 803 or 805, the Secretary shall transmit to the chairman written notice—

"(1) containing a copy of the list submitted to the Secretary under subsection (b)(3) in which such application is ranked;

"(2) specifying which other applications ranked in such list have been approved by the Secretary under sections 803 and 805; and

"(3) if the Secretary has not approved each application superior in merit, as indicated on such list, to the application with respect to which such notice is transmitted, containing a statement of the reasons relied upon by the Secretary for—

"(A) approving the application with respect to which such notice is transmitted; and

"(B) failing to approve each pending application that is superior in merit, as indicated on such list, to the application described in subparagraph (A).".

PROCEDURAL REQUIREMENTS

SEC. 503. (a) The Native American Programs Act of 1974 (42 U.S.C. 2991-2992d) is amended by inserting after section 813, as so redesignated by section 502, the following new section:

"ADDITIONAL REQUIREMENTS APPLICABLE TO RULE MAKING

"SEC. 814. (a) Notwithstanding subsection (a) of section 553 of title 5, United States Code, and except as otherwise provided in this section, such section 553 shall apply with respect to the establishment and general operation of any program that provides loans, grants, benefits, or contracts authorized by this title.

"(b) The exception provided in subparagraph (A) of the last sentence of section 553(b) of title 5, United States Code, shall not apply with respect to any rule (including any general statement of policy) that is—

"(1) proposed under this title;

"(2) applicable exclusively to any program, project, or activity authorized by, or carried out under, this title; or

"(3) applicable to the organization, procedure, or practice of an agency (as defined in section 551(1) of title 5, United States Code) and that would solely affect the administration of this title.

"(c) The exceptions provided by paragraphs (1) and (2) of section 553(d) of title 5, United States Code, shall not apply to any rule (or general statement of policy) that—

"(1) is issued to carry out this title;

"(2) applies exclusively to any program, project, or activity authorized by, or carried out under, this title; or

"(3) is applicable to the organization, procedure, or practice of an agency (as defined in section 551(1) of title 5, United States Code) and that will solely affect the administration of this title.

"(d) Each rule to which this section applies shall contain after each of its sections, paragraphs, or similar textual units a citation to the particular provision of statutory or other law that is the legal authority for such section, paragraph, or unit.

"(e) Except as provided in subsection (c), if as a result of the enactment of any law affecting the administration of this title it is necessary or appropriate for the Secretary to issue any rule, the Secretary shall issue such rule not later than 180 days after the date of the enactment of such law.

"(f) Whenever an agency publishes in the Federal Register a rule (including a general statement of policy) to which subsection (c) applies, such agency shall transmit a copy of such rule to the Select Committee on Indian Affairs of the Senate and to the Committee on Education and Labor of the House of Representatives.".

(b) Section 815 of the Native American Programs Act of 1974 (42 U.S.C. 2992c), as so redesignated by section 502, is amended—

(1) in paragraph (3) by striking out "and" at the end thereof,

(2) by redesignating paragraph (4) as paragraph (5), and

(3) by inserting after paragraph (3) the following new paragraph:

"(4) the term 'rule' has the meaning given it in section 551(4) of title 5, United States Code, as amended from time to time; and".

INCLUSION OF NATIVE AMERICAN PACIFIC ISLANDERS

SEC. 504. (a) Subsection (a) of section 803 of the Native American Programs Act of 1974 (42 U.S.C. 2991b(a)) is amended by inserting the following sentence after the first sentence thereof: "The Secretary is authorized, subject to the availability of funds appropriated under the authority of section 816(c), to provide financial assistance to public and nonprofit private agencies serving Native American Pacific Islanders (including American Samoan Natives) for projects pertaining to the purposes of this Act.".

(b)(1) Section 802 of the Native American Programs Act of 1974 (42 U.S.C. 2991a) is amended by inserting ", Native American Pacific Islanders (including American Samoan Natives)," after "Hawaiian Natives".

(2) Paragraph (2) of section 806(a) of the Native American Programs Act, as added by section 502(4) of this Act, is amended by inserting "Native American Pacific Islanders (including American Samoan Natives)," after "Hawaiian Natives,".

(3) Section 808 of the Native American Programs Act of 1974 (42 U.S.C. 2991f), as redesignated by section 502, is amended by inserting "or Territory" after "State" each place it appears.

AUTHORIZATION OF APPROPRIATIONS

SEC. 505. Section 816 of the Native American Programs Act of 1974 (42 U.S.C. 2992d(a)), as redesignated by section 502 of this Act, is amended—

(1) by striking out "1979 through 1986" in subsection (a) and inserting in lieu thereof "1987, 1988, 1989, 1990, and 1991", and

(2) by adding at the end thereof the following new subsection:

"(c) There are authorized to be appropriated $500,000 for each of the fiscal years 1987, 1988, 1989, 1990, and 1991 for the purpose of providing financial assistance to Native American Pacific Islanders (including American Samoan Natives) under section 803(a).".

REVOLVING LOAN FUND FOR NATIVE HAWAIIANS

SEC. 506. The Native American Programs Act of 1974 (42 U.S.C. 2991) is amended by inserting immediately after section 803 the following new section:

"LOAN FUND; DEMONSTRATION PROJECT

"SEC. 803A. (a)(1) In order to provide funding that is not available from private sources, the Secretary, acting through an appropriate State agency, or a community-based Native Hawaiian organization whose purpose is economic and social self-sufficiency, shall establish and carry out, in the State of Hawaii, a 60-month demonstration project involving the establishment of a revolving loan fund—

"(A) from which the Secretary, acting through such agency or community-based Native Hawaiian organization, shall make loans to Native Hawaiian organizations and to individual Native Hawaiians for the purpose of promoting economic development,

"(B) into which all payments, interest, charges, and other amounts collected from loans made under subparagraph (A) shall, notwithstanding any other provision of law, be deposited.

"(2) The Secretary may make loans under paragraph (1)(A) only if the Secretary determines that—

"(A) the borrower is unable to obtain financing from other sources on reasonable terms and conditions, and

"(B) there is a reasonable prospect that the borrower will be able to repay the loan.

"(3)(A) Loans made under paragraph (1)(A) shall be—

"(i) for a term that does not exceed 5 years, and

"(ii) at a rate of interest determined by the Secretary of the Treasury on the basis of the market yield on municipal bonds at the time the loan is made.

"(B) Notwithstanding subparagraph (A)(ii), the rate of interest on loans made under paragraph (1)(A) shall not exceed the average yield on marketable obligations of the United States of comparable maturity that are outstanding at the time the loan is made.

"(4) The Secretary is authorized to require any borrower of a loan under paragraph (1)(A) to provide such collateral as the Secretary determines to be necessary to secure the loan.

"(5)(A) The Secretary may cancel, adjust, compromise, or reduce the amount of any loan made under paragraph (1)(A), or release or subordinate any collateral securing payment of such amount, if the Secretary determines that—

"(i) such amount is uncollectable or collectable only at an unreasonable cost, or

"(ii) such action would be in the best interests of the United States.

"(6) The Secretary, out of funds available in the revolving loan fund established under paragraph (1), shall—

"(A) pay expenses incurred by the Secretary in administering the revolving loan fund, and

"(B) provide competent management and technical assistance to borrowers for loans made under paragraph (1)(A) to assist the borrower in meeting the objectives of the loan.

"(7) The Secretary, in consultation with such State agency or community-based Native Hawaiian organization, shall prescribe regulations which set forth the procedures and criteria to be used in making loans under paragraph (1)(A). The Secretary is authorized to prescribe such other regulations as may be necessary to carry out the purposes of this subsection, including regulations involving reporting and auditing.

"(8) No loan shall be made from the fund upon the expiration of the 60-month period following the date of the enactment of this Act.

"(9)(A) Notwithstanding any other provision of this Act, there is authorized to be appropriated to the fund established pursuant to this section the sum of $3,000,000, to remain available until expended.

"(B) Moneys in the fund shall be available for expenditure by the Secretary without fiscal year limitation for the purpose of carrying out the provisions of this title.

"(10) All moneys in the fund following the termination of the demonstration project under this section, not otherwise needed, as determined by the Secretary, to carry out this section, shall be deposited in the Treasury of the United States as miscellaneous receipts. All amounts thereafter deposited in the fund pursuant to subsection (a)(1)(B) of this section following such termination shall be transferred to the Treasury as miscellaneous receipts.

"(b) On or before the expiration of the 48-month period following the date of the enactment of this section, the Secretary, in consultation with the State agency or contracting community-based Native Hawaiian organization referred to in paragraph (1) of subsection (a) of this section, shall report to the Congress concerning the administration of this section, together with the views and recommendations of the Secretary as to the effectiveness of the demonstration program, and whether it should be expanded to other groups eligible for assistance under this section, and extended.".

EFFECTIVE DATE

SEC. 507. Notwithstanding the provisions of section 401 of this Act, the amendment made by section 506 of this Act shall take effect upon the expiration of the 90-day period following the date of the enactment of this Act.

PURPOSE

Title V of S. 887, the Native American Programs Amendments Act of 1987 would extend programs under the Native American Programs Act of 1974, through fiscal year 1991, and authorize appropriations for fiscal years 1987, 1988, 1989, 1990, and 1991.

BACKGROUND

The Native American Programs Act, which was passed in the 93rd Congress, established the Administration for Native Americans (ANA) within the Department of Health, Education and Welfare. The ANA is now constituted in the Department of Health and Human Services. Its legislative mandate is to promote economic and social self-sufficiency for American Indians, Alaskan Natives, and Native Hawaiians.

According to the 1980 census, there are 1.4 million American Indians in the United States. Although there is considerable mobility between reservation and urban areas, it is estimated that about one-half live on Indian reservations or in rural areas near those reservations; the other one-half live in urban areas or away from reservations. It is also well-documented that American Indians and Alaskan Natives rank lowest in all indicators of social and economic well-being. For example, Native Americans suffer from the poorest health, the worst housing, the highest school drop-out rates, and the greatest levels of unemployment. These conditions are related to social and economic underdevelopment, and hence, the need for federal programs that can assist Native American communities and their families to become self-sufficient.

The ANA mission is to fund programs aimed at providing community or tribal self-sufficiency. The ANA program defines self-sufficiency as the level of development at which a Native American community can control and internally generate resources to provide for the needs of its members and meet its own short and long range social and economic goals. It is the only agency within the Department of Health and Human Services which serves all Native Americans; without regard to where they live or their tribal or group affiliation. Its constituents include American Indians, Native Hawaiians, and Alaska Natives. The ANA has a broad mission which involves cooperative efforts with other Federal agencies to avoid duplication of programs and to maximize Federal dollars. The program operates under the philosophy that no Federal program, acting alone or in concert with other Federal programs can achieve self-sufficiency for Native American tribes or groups. The ANA programs promote the concept that self-sufficiency can be achieved only when Native Americans plan, design, and operate their own social and economic programs which address the particular needs of their communities. The ANA policies are designed to support this approach at the community level through the following goals:

(1) Governance—to strengthen Tribal governments, Native American institutions and local leadership to assure local control over all resources.

(2) Economic Development—to foster the development of stable, diversified local economies which provide jobs and reduce dependency on social services.

(3) Social Development—to support access to, and coordination of, services and programs which safeguard the health and well-being of Native Americans, and which are essential to thriving and self-sufficient communities.

The Native American constituency is diverse in terms of its culture, legal status, size, resources, level of community development, and eligibility for federal services. The diversity of the distinctions many times is confusing and has resulted in serious gaps in services or assistance to Native Americans. The ANA has the statutory authority to bridge these confusing and complex relations between Native Americans groups and the federal government. The flexibility of the program has given many tribes and groups access to federal assistance and has brought them closer to their goals of social and economic self-sufficiency. Unlike the Bureau of Indian Affairs and the Indian Health Service, both major sources of Federal Indian services, the ANA program provides assistance to non-federally recognized and terminated Indian tribes, as well as other off-reservation Indian organizations, including urban Indian centers.

The Native American Programs Act of 1974 was originally enacted on January 4, 1975 (P.L. 93-644). Among federal programs, the Act is unique in providing assistance for the benefit of Native Americans. The Act was extended in 1978 (P.L. 95-568), 1981 (P.L. 97-35), and 1984 (P.L. 98-558).

When the ANA first began, the emphasis of the program was primarily to support the core administration for tribal governments and Native American organizations. Its secondary emphasis was to support local access to social services or to fill gaps in those services. Since that time, the program has moved towards a larger objective of improving the social and economic development of tribes and other native organizations. In 1980, the ANA began the implementation of a new initiative called Social and Economic Development Strategy (SEDS) which encourages tribes and native organizations to develop projects that promote social and economic development based upon the needs of the various groups.

Assistance under section 803 is provided through grants and contracts to a broad range of eligible native entities, including the governing bodies of Indian tribes on Federal and state reservations, Alaskan Native villages and regional corporations, public and private nonprofit agencies serving Hawaiian Natives, and Indian organizations in urban and rural off-reservation areas. Examples of program objectives under section 803 grants include: Increased employment of Native Americans; Indian business development; strengthening of tribal government functions; construction and renovation of housing units; and Alaskan Native village development.

The ANA programs authorize training and technical assistance for the purpose of assisting eligible entities in developing and administering projects. Research, demonstration and evaluation is au-

thorized to assist in the development of new approaches that will enhance the social and economic development of local Native American communities.

Background on Native American Pacific Islanders (Including American Samoan Natives)

Title V proposes to add a new group of entities eligible for the programs of ANA. Section 504 authorizes the ANA to provide financial assistance to public and nonprofit private agencies serving Native American Pacific Islanders (including American Samoan Natives), subject to the availability of specific appropriations. Section 505 authorizes appropriations in the amount of $500,000 for each of the fiscal years 1987, 1988, 1990, 1991 to be used for these new eligible groups.

Native American Pacific Islander (including American Samoan Natives) is intended to comprise any of the indigenous people residing in Guam, America Samoa, or the Northern Marian Islands. In addition, due to the immigration of American Samoan Natives to Hawaii and the continental United States, there is now a concentration of American Samoan Natives in the states of Hawaii, California and Washington. Under the provisions of S. 142 public and nonprofit agencies serving these groups would be eligible to receive financial assistance from the ANA program.

Generally, the term Native American Pacific Islander refers to (1) any Native Hawaiian; (2) any of the indigenous people residing in Guam, American Samoa, the Trust Territory of the Pacific Islands, or the Northern Mariana Islands; or (3) any individual whose direct ancestors are from Guam, American Samoa, the Trust Territory of the Pacific Islands, or the Northern Mariana Islands. The first group in this category, Native Hawaiian, is already an eligible entity for purposes of participating in the ANA programs. In the second group of people considered a part of the Native American Pacific Islander definition, only Guam, American Samoa, and the Northern Mariana Islands continue to be territories of the United States. The Committee is advised that the other indigenous people residing in the trust territories of the Pacific Islands have chosen their own path toward sovereignty. By the Compact of Free Association, effective November 3, 1986, the Trust Territory of the Pacific Islands, commonly referred to as Micronesia, ceased to be a trust territory of the United States. Palau, the remaining island in the Pacific trust territory, approved its constitution in 1980 and is now known as the Republic of Palau. It is currently working toward an independent status. If any of the territories mentioned in this section become sovereign political entities, and relinquish their U.S. territorial status, they will no longer be eligible to receive services under this Act.

In addition, individuals whose direct anscestors are from Guam, American Samoa, the Trust Territory of the Pacific, or the Northern Mariana Islands are generally included in the category of Native American Pacific Islander. Therefore, any public and nonprofit agency serving any of the indigenous people residing in Guam, American Samoa, or the Commonwealth of the Northern Mariana Islands, or any public and nonprofit agency serving indi-

viduals whose direct ancestors are from these same islands would be eligible to receive financial assistance from the ANA program. Furthermore, any public or nonprofit agency serving Native American Samoans residing in Hawaii, or the mainland of the United States would be considered an eligible entity to be served by the ANA. Here again, the status of the Trust Territory of the Pacific Islands has been changed due to the signing of the Compact of Free Association. That is, United States control over the Trust Territory has been virtually eliminated. The Trust Territory of the Pacific no longer has the legal status comparable to the U.S. "territories" of Guam, American Samoa, and the Northern Mariana Islands, now called the Commonwealth of the Northern Mariana Islands.

These population groups have cultural, social, and economic demographics similar to other Native American entities served by the ANA program. They have unique and special problems which require programs to assist them in the development of self-sufficient communities that take into account social and cultural variables. Generally, all these groups have relatively young populations, limited English language proficiency and communicative competence, lack of education, and lack of job skills. As a result, they experience, high levels of unemployment, unacceptable rates of alcoholism, violent crimes, health problems, and other social problems associated with extreme poverty.

Although all groups that are encompassed in the definition Native American Pacific Islander (including Native American Samoan) would be eligible to receive financial assistance from ANA, under the provisions of Title V, it is anticipated that public and nonprofit agencies serving American Samoan Natives will be the major entity seeking financial assistance from the ANA. In 1983, during conference committee consideration of the Job Training Partnership Act, Congress mandated that the Department of Labor, Employment and Training Division conduct a study of the unique and special problems facing American Samoans migrating to the United States. Congress expressed particular concern with poverty, educational attainment, employment status, and English language ability among American Samoans. Congress also found it lacked information about American Samoans and called for a report that "details the dimensions of employment and poverty among American Samoans and recommends specific actions that can carry out our historic responsibilities to these people." (H.R. 97-889, 1982: 109-110).

The Department of Labor completed its final report to Congress in July of 1984. The study showed that Samoans are a numerically small population. In all locales where they reside, Samoans constitute only a small proportion of the population. They account for 0.2%, 1.5%, and 0.1% of the California, Hawaii and Washington populations respectively.

The percentage of Samoan families living below the poverty level is 190% greater than all families in the United States. When compared by state where Samoans are more heavily concentrated, even greater discrepencies emerge. In California 21.0 percent of Samoan families live below the poverty level, compared with 8.7 percent of all California families; in Hawaii 37.5 percent of Samoan families are below the poverty level compared with 7.8 percent of all Ha-

waiian families. The incidences of Samoans in severe poverty (below 75% of poverty level) and near poverty (150% to 200% of poverty level) is also highest in Hawaii. Per capita income for Samoans residing in the United States is $3,573, second lowest per capita of all population groups.

The unemployment of Samoans in the United States is much greater than that of the general population. The 1980 census indicated that 9.7 percent of all Samoans in the labor force are unemployed. In California, 10.1 percent of all Samoans in the labor force are unemployed, 150% greater than the overall state unemployment rate of 6.5 percent. In Hawaii, the overall unemployment rate of Samoans is 10.2 percent which is more than double the rate of the state as a whole.

Samoans tend to be simply overlooked by many community-based agencies and organizations that provide health, educational, and other social service programs. Data shows that personnel in existing services and programs know little about the unique aspects of Samoan culture and tradition. Research indicates that there have been few outreach efforts, and only isolated attempts to hire Samoan program staff to increase Samoan paticipation in programs. As a result, local Samoan communities lack knowledge about the range of existing services. Consequently, Samoan participation in many community-based social programs is low.

To include American Samoans in the Native American Programs Act would be a critical first step in addressing the severe problems experienced by this group. Financial assistance from the ANA program would allow for the design of programs to meet the social and economic needs of the local Samoan communities. As mainstream employment and training, and social services programs become aware of the needs of Samoans, service delivery systems could be adapted to meet those unique needs.

Native American Samoans residing in the Territory of American Samoa would also be eligible entities for purposes of participating in the ANA programs. That is, those public and nonprofit agencies serving this group would be eligible to receive financial assistance from ANA. American Samoa consists of the main island of Tutuila and the islands east and north of it; Aunu'u; the Manua Group of three islands 130 km. east of Tutuila; Swains Island to the north; and the uninhabited Rose atoll. Eighty percent of the population is situated on the island of Tutuila, which also comprises almost all of the total land mass of America Samoa. The estimated population in 1982 was 33,920 persons. The population demographics are influenced by the heavy migration of Samoans to the United States, especially in males of the 15 to 30 year age group. In addition, there has been a substantial shift in the population within American Samoa. This has involved the movement of people from the rural and less economically advanced areas to the urban areas of Tutuila. The islands are dominated by mountains, which limit population centers to coastal areas. The quality and quantity of available housing is inadequate, as is sanitary facilities. The average family size is seven individuals although the Samoan culture puts strong emphasis on the extended family. Despite increasing westernization and some economic development, the traditional Samoan cul-

ture is very strong. Traditional beliefs, customs, and habits strongly influence the delivery of social services to Samoans.

Public and nonprofit agencies serving Guamanians would be eligible to receive financial assistance from ANA. Guam, has an indigenous and majority population of Chamorros. Depopulation, disease, and warfare during the three hundred years of Spanish rule virtually exterminated the traditional society. Although the Chamorros are now a mixture of Spanish, American, and to a lesser extent, other racial extractions, they still retain many distinct cultural characteristics such as strong bonds of familial obligation and support of extended family networks, strong societal structures, interpersonal sensitivity, and cultural traditions. United States expatriates and aliens compose a small proportion of the Islands civilian residents, while active duty military personnel and military dependents represent an estimated twenty percent of the total population.

The total civilian population of Guam is also very young. Approximately forty percent are under fifteen years of age. Less than three percent are over the age of sixty-five. Military-related expenditures, tourism, a large public employment sector, and a smaller private employment sector, make up Guam's economy. The future expansion of Guam is hampered by the lack of skilled indigenous manpower, scarce raw materials, the island's size, and a relatively small population base. During the 1960's and 1970's, Guam experienced a rapid economic growth due to increased military spending, active foreign investments, and increased tourism. Since the late 1970's, there has been resultant decline in economic growth, rising inflation, and high unemployment. Guam's per capita income is only $4,800 per year, $2,500 below the national average. Thirteen percent of all families live below the poverty level, four percent more than the average nationwide.

Under the provisions of Title V, public and nonprofit agencies serving indigenous and descendants of indigenous people of the Northern Mariana Islands, now known as the Commonwealth of the Northern Mariana Islands would be eligible entities to be served by ANA. The indigenous and current majority population of the Marianas is Chamorro; however, depopulation, forced resettlement, disease, and decimation by the spanish in the eighteenth century has virtually undermined and exterminated the traditional society. The Chamorros today still retain their characteristic strong extended family ties and individualism but are more a mixture of Spanish, Filipino, German, Japanese, and American. Expatriates and aliens compose a very small proportion of residents. Approximately 25% of the remaining Marianas inhabitants are descendants of Carolinians who migrated to Saipan from the atolls between Yap and Truk after fierce typhoons destroyed almost all vegetation of their islands.

The population of the Northern Marianas is very youthful. More than fifty percent are under the age of fifteen. Other than a significant amount of public employment, tourism, and to a lesser extent, cash crop production, economic development to support the island has been slow because of the area's size, small population base, and limited natural resources. Foreign investments have been restricted to some degree by a constitutional provision that any corporate

director must be fifty-one percent Northern Marianas descent. Agricultural lands cultivated during the Japanese occupation of the Marianas were largely destroyed in World War II. Post World War II agriculture has lost momentum as the society has become more urbanized. Limited local revenues have supported less than half of the Islands' total operating budget. As with the other eligible entities of the ANA programs, the Northern Marianas face similar social and economic problems. ANA would be very valuable in assisting the development of organizations and agencies that more appropriately address the special social service needs of these native peoples. ANA would assist in the planning and development of community social and economic strategies to foster stable, diversified local economies which could provide jobs and reduce dependency on social services, and to support access to and coordination of programs and services which safeguard the health and well-being of its community and its people.

The Department of Justice (see attachment under EXECUTIVE COMMUNICATIONS) objected to the inclusion of American Samoans in the Native Americans Program Act. The basis for the Department's position is that the trust relationship that has been established for Native Americans has not been established for American Samoans. In response the Committee requested an analysis of the legal issues by the American Law Division of the Library of Congress, whose opinion is attached. The American Law Division concluded that there is a "rational basis" for the inclusion of American Samoans as well as a "legitimate public purpose", thus satisfying the standards for constitutionality as defined by the controlling cases decided by the U.S. Supreme Court.

CONGRESSIONAL RESEARCH SERVICE,
THE LIBRARY OF CONGRESS,
Washington, DC, June 16, 1987.

To: Senate Select Committee on Indian Affairs.
Attention: Alan Parker.
From: American Law Division.
Subject: Whether Including Native American Pacific Islanders As Beneficiaries of the Native American Programs Act Raises Serious Constitutional Questions.

This responds to your request of June 5, 1987, for an analysis of the Department of Justice memoranda dated May 12, 1987, and April 8, 1987, to Hon. Augustus S. Hawkins, Chairman of the House Committee on Education and Labor, and Hon. Daniel K. Inouye, Chairman of the Senate Select Committee on Indian Affairs, respectively.

These memoranda address the provisions of H.R.1451/S.142 authorizing the Secretary of Interior to provide, under the Native Americans Programs Act of 1974,[1] financial assistance to public and nonprofit private agencies serving, *inter alia*, Native American Pacific Islanders (including American Samoan Natives), and setting up panels to review applications for financial assistance that are to

[1] Pub. L. 88-452, Tit. VIII, sec. 801, *et seq.*, as added by Pub. L. 93-644, sec. 11, 88 Stat. 2314 (1975), codified at 42 U.S.C. 2991.

give preference to American Indians, Hawaiian Natives, and Alaskan Natives in their composition.

The Department of Justice Memoranda.—The Department of Justice views this legislation as raising serious equal protection questions because it distinguishes a discrete racial group for preferential treatment without a showing of past governmental discrimination that is being remedied. The Department acknowledges that, in *Morton* v. *Mancari,* 417 U.S. 535 (1974), the Supreme Court recognized that preferential treatment for hiring Indians by the Bureau of Indian Affairs was permissible, but it reads that decision narrowly, essentially limiting it to its facts.

The Earlier CRS Memorandum.—In our memorandum to you, dated June 7, 1982, entitled "Constitutionality of Including American Samonas Residing in Hawaii or American Samoan Citizens in Title II of S. 2036," we concluded that were American Samoan citizens or American Samoans living in Hawaii added to the class of persons entitled to participate in federally administered job programs for Native Americans, the courts would be likely to uphold the legislation. That conclusion was based primarily on according a broader reading to *Morton* v. *Mancari,* particularly in its allusion to the federal trusteeship authority over Indians, than does the Department of Justice. We also viewed the fact that at that time no Supreme Court case had ever found a statute enacted by Congress to fulfill the federal trusteeship obligation to be unconstitutional as buttressing the broad reading of *Morton* v. *Mancari.*

Further Legal Developments. Today, although the reasons for reading *Morton* v. *Mancari* more expansively than does the Department of Justice are the same as they were in 1982, there has been a decision by the United States Supreme Court finding a federal statute enacted for the protection of Indians to be unconstitutional. While that case, *Hodel* v. *Irving,* —— U.S. ——, (No. 85–637, decided May 18, 1987), does not deal with an equal protection claim and is completely distinguishable on its facts,[2] its existence diminishes one of the arguments made in favor of the validity of including American Samoans in Native American Programs; namely, the argument that the Court had traditionally deferred to Congress in exercising its trusteeship role.

In terms of the *Morton* v. *Mancari* decision, however, there are strong grounds to read it more broadly than the Department of Justice would. There is strong language in the case emphasizing the breadth of Congressional authority in the field of Indian affairs: "As long as the special treatment [for Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Morton* v. *Mancari,* 417 U.S. 535, 555. It is also true that while the Court repeatedly alluded to the fact situation involving hiring for the Bureau of Indian Affairs for its services to tribes and to Indians living in or near tribal reservations, the statutes in question did not require the Indians hired to be members of tribes. It is also

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[2] *Hodel* v. *Irving* involved sec 207 of the Indian Land Consolidation Act of 1983 Pub. L. 97–459, Tit. II, 96 Stat. 2519, 25 U.S.C. 2206 (1982 ed., Supp. III), which would have prevented Indian owners of small fractions of allotted lands worth minimal sums from passing the fractions either by intestate succession or testamentary disposition. The Court found the legislation, which has since been amended, to be an unconstitutional taking in violation of the Fifth Amendment.

true that the Court in its opinion emphasized both the "unique legal status of Indian tribes under federal law," *Morton* v. *Mancari*, 417 U.S. 535, 551, and the fact that political relationships with tribes were involved in Indian legislation administered by the Bureau of Indian Affairs for Indians living on or near reservations. On the other hand, the decision can also be read as equally supportive of the trust responsibility of the United States arising out of its position as guardian of its Indian wards. It quoted the following description of that relationship from *Board of County comm'rs* v. *Seber*, 318 U.S. 705, 715 (1943):

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. . . .—*Morton* v. *Mancari*, 417 U.S. 535, 552.

It might also be added that there is further legal authority for a broad reading of *Morton* v. *Mancari*. Subsequent decisions indicate a willingness to read the decision broadly. The Supreme Court, in *Delaware Tribal Business* v. *Weeks*, 437 U.S. 73 (1974), invoked the *Morton* v. *Mancari* "tied rationally to Congress' unique obligation to Indians" standard to uphold legislation distributing an award under the Indian Claims Commission Act to two branches of descendants of the original Delaware nation but not to a third branch. In *Alaska Chapter, Associated Gen. Contr.* v. *Pierce*, 694 F.2d 1162 (9th Cir. 1982), a United States Court of Appeals upheld regulations of the Department of Housing and Urban Development, pursuant to the Indian Self-Determination Act, 25 U.S.C. 450–458, requiring preference be given to Indian-owned economic enterprises in awarding of subcontracts and subgrants in connection with housing programs for Indians. The court applied a test derived from *Morton* v. *Mancari*, rather than the strict scrutiny test that would be applied were racial discrimination involved. It read *Morton* v. *Mancari* as requiring that legislation involving special treatment for Indians be upheld if it is "rationally related to the furtherance of Congress' unique obligation to Indians" and refused to add as a further limitation that the object of the special treatment be to promote Indian self-government. *Alaska Chapter, Associated Gen. Contr.* v. *Pierce*, 694 F.2d 1162, 1167.

Legal Authority Specifically Addressing Trusteeship for Natives Other Than Tribal Indians.—On the other hand, we could find no case that involved a Congressional statute that was not directed at tribal Indians or Indians living on or near reservations that has been attacked as violative of Equal Protection since *Morton* v. *Mancari*. It is, thus, possible that the Department of Justice's narrow interpretation of *Morton* v. *Mancari* may be followed were a court to confront a question involving Congressional preferential treatment for individual Indians. In other words, the Court could

require that special treatment for Indians be tied to tribal relationships to distinguish such treatment from impermissible racial discrimination. Even if that were the case, however, a distinction could be made with regard to aboriginal inhabitants of U.S. territories who are not organized in tribes. There is a long line of precedent indicating that the reason for the guardianship of Indians is in the nature of a moral requirement incumbent on the sovereign government to protect aboriginal people whose ways may cause them harm in any dealings with the general populace.

In *United States* v. *Sandoval,* 231 U.S. 28, 45–46 (1913), the case in which the Supreme Court determined that the Pueblos of New Mexico were Indians and, thus, subject to the federal Indian liquor laws, the Court noted,

> Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and duty of exercising a fostering care and protection over all dependent Indian communities within its original territory or territory subsequently acquired, and whether within or without the limits of a State.

The power of Congress over Indian affairs has been upheld as extending to aboriginal groups not specifically tribal or Indian, e.g., Alaska Natives.[3] The courts have interpreted the word, "Indian," in federal statutes to include Alaskan Natives.[4] The same logic that argues for a federal wardship of Indians applies to a federal guardianship of the aboriginal peoples of unincorporated territories.

The guardianship is political rather than racial. It derives from the fact that the dependent indigenous people need protection. In the case of Native Hawaiians, who like the Samoans are not organized in tribes, the federal government has apparently recognized a trust relationship by providing for them in special legislation since 1921 with the enactment of the Hawaiian Homes Commission Act.[5]

The analogy between the Indians and American Samoans seems sufficient to imply a trusteeship relationship between them and the United States. American Samoan Natives are descendants of the aboriginal people of American Samoa. Their territory is subject to the sovereignty of the United States by virtue of agreements signed with the chief of the Samoan people in 1900 and 1904 and ratified by Congress subsequently.[6] Unlike the Indians, the Alaskan Na-

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[3] See Cohen, F., *Handbook of Federal Indian Law* 404–406 (1942).

[4] In *Pence* v. *Kleppe,* 529 F.2d 135 (9th Cir. 1976), for instance, it was held that Native Alaskans who were challenging the Secretary of Interior's interpretation of the allotment provisions of the Alaska Native Allotment Act could bring a claim as "Indians" in federal court under a statute, 25 U.S.C. 345, that permitted all persons of Indian blood or descent entitled to an allotment under any federal statute to bring a suit for such in federal district court. In *United States* v. *Native Village of Unalakleet,* 411 F.2d 1255, 1256–1257 (Ct.Cl. 1969), the United States Court of Claims held that various groups of Alaskan natives, not ethnologically Indian, could bring actions under the Indian Claims Commission Act, 25 U.S.C. 70a, as an "identifiable groups of American Indians," under the statute, holding it to be the intent of Congress the term "to encompass all claims by all American aborigines and that the term 'American Indian' is not used with a view to excluding the descendants of any pre-Columbian inhabitants of North America."

[5] Act of July 9, 1921, ch. 42, 42 Stat. 108.

[6] Acts of February 20, 1929, ch. 281, 45 Stat. 281, 48 U.S.C. 1661, 70th Cong., 2d Sess. (1929).

tives, and the Native Hawaiians, American Samoans do not live in territory destined for statehood, but in an unincorporated, unorganized territory possibly destined for independence.[7] In any case, the goal is for them to administer their own affairs and the duty of their trustee, arguably, to perpare them for self-sufficiency.

Conclusion.—If Congress were to conclude that American Samoan participation in the Native American Programs would foster their development toward that end, it would seem that the courts could uphold their inclusion in such a program under the *Morton* v. *Mancari* test for exercise of trusteeship as reiterated in *Delaware Tribal Business Comm.* v. *Weeks*, 437 U.S. 73, 83-85 (1977), i.e., if the legislation was "tied rationally to the fulfillment of Congress' unique obligation toward Indians."

In your memorandum, you indicated that S. 142, as reported, would add to the class of persons receiving benefits under the Native American Programs Act, "Native American Pacific Islanders (including American Samoan Natives)." From the foregoing analysis, it would seem that the courts could uphold the legislation on the *Morton* v. *Mancari* reasoning so long as it is clear that the term is limited to descendants of aboriginal people of lands over which the United States has assumed sovereignty. *Hodel* concerned the first piece of Congressional legislation in behalf of Indians or Aboriginal people that the Supreme Court has held unconstitutional and that is readily distinguishable from the current issue. It involved private property and was analyzed in terms of property law. The Native American Programs Act involves bestowal of government services, rather than confiscation of private property.

Since there is no dispositive case law, until there is a challenge to federal legislation including Native American Samoans in preferential legislation, the matter will remain unsettled. There does seem to be sufficient legal authority, however, for Congress to conclude that preferential treatment for Native American Samoans could be upheld by the courts and that the Department of Justice memoranda are more conservative on this point than the current case law suggests.

The Department of Justice memoranda imply that *Morton* v. *Mancari* demands that federal Indian services or preferences be linked to federal obligations to tribes. To the extent that tribes are the governing bodies of the descendants of aboriginal peoples that the United States has dealt with, that my be ture. There is, however, adequate authority for linking federal legislation to other types of organizations, Alaskan Native villages having minimal governmental authority, for example.[8] If Native American Pacific Island-

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[7] See, for example, General Assembly Resolution 1514, 7 U.N. GAOR Supp. (No. 16) 66-67, U.N. Doc. A/4684 (1960), declaring that *inter alia*:

> Immediate steps shall be taken, in . . . all other territories which have not yet attained independence, to transfer all powers to the peoples of those territories, without any conditions or reservations. . . .

[8] The Native American Programs benefits are administered by the federal government in addition to similar programs administered by the states. They are provided to federally recognized Indian tribes, bands, and groups as well as to other individuals of Native American descent. 29 U.S.C. 1671. Programs for Indians are to be administered by tribes if feasible; those for Hawaiian natives are to be administered by the Secretary of Labor through organizations determined to meet their needs. Nonreservation Native Americans are to be served by programs designed to meet their needs.

Continued

ers (including Native American Samoans) have no form of organization other than public and private non-profit agencies that serve them and if Congress sees an obligation to these people, it may be that use of these organizations would be the only feasible way of discharging those obligations. The fact that there are no government-to-government relationships with these organizations may not be an insurmountable problem since the reason for singling these people for benefits is basically political rather than racial, as they are the descendants of the original inhabitants of the various territories.[9] In the case of American Samoans the analogy is clearer since American Samoans, like American Indians, are descendants of the aboriginal people who ceded land to the United States by agreements.[10]

Summary.—To summarize, although the *Hodel* decision somewhat weakens the arguments that were used to conclude, in 1982, that including American Samoans in Native American Programs legislation would likely be held constitutional, there is adequate authority in court cases dealing with Indians and other aboriginal peoples to support a conclusion that including Native American Pacific Islanders in such programs could be upheld by the federal courts.

We hope this information is helpful to you and that you will call upon our office should you have further need of our assistance.

M. MAUREEN MURPHY,
Legislative Attorney.

EXPLANATION OF TITLE V

Title V of S. 887 reauthorizes the Native American Programs Act of 1974 through fiscal year 1991. The bill authorizes appropriations for fiscal years 1987, 1988, 1989, 1990, and 1991. Title V adds new provisions related to applications for assistance and rulemaking, and authorizes financial assistance to private agencies serving Native American Pacific Islanders (including American Samoan Natives) subject to the availability of funds appropriated specifically for them. A new provision authorizes appropriations in the

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A Congressional findings section of the Native American Programs Act, 29 U.S.C. 1671(a), indicates that the special programs for Native Americans were prompted by recognition of serious unemployment and economic disadvantages among these groups and are to be geared to "the advancement of economic and social development in the communities consistent with their goals and lifestyles."

[9] Although "Hawaiian Natives" is not defined in the Native American Program Act, other statutes contain definitions of this term, all of which are careful to require descent from the inhabitants of the Hawaiian Islands before the United States acquired them. For example, the Hawaiian Homes Commission Act, Act of July 9, 1920, ch. 42, 42 Stat. 108, established a commission to administer 200,000 acres of land to be leased for various agricultural purposes at nominal rates for 99-year periods to "native Hawaiians." The statute defined "native Hawaiian" as any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." 42 Stat. 108.

Sections 351 *et seq.* of Title 20, U.S.C., provide appropriations for grants to improve public library services with special provisions applicable to Indian tribes and to organizations, recognized by the Governor of Hawaii, that primarily serve and represent Hawaiian natives. "Hawaiian native," under this legislation is "any individual any of whose ancestors were natives prior to 1778 in the area which now comprises the State of Hawaii." 20 U.S.C. 352a(16). Similar definitions are used in vocational assistance legislation, 20. U.S.C. 2313(c), and Job Training Partnership Act, 29 U.S.C. 1501 *et seq.*

[10] Agreements, in 1900 and 1904, with the chiefs of the Samoan people were ratified by Congress in 1929. Act of February 20, 1929, ch. 281, 45 Stat. 282, 48 U.S.C. 161, 70th Cong., 2d Sess. (1929).

amount of $500,000 for fiscal years 1987 through 1991 for the purpose of providing financial assistance to American Pacific Islanders (including American Samoan Natives). A second new provision authorizes a $3,000,000 demonstration revolving loan program for Native Hawaiians. The project is authorized for five years, after which time the funds are returned to the U.S. Treasury.

Section 502 contains two provisions related to applications for assistance. The first amends section 803 to authorize the Administration for Native Americans (ANA) to award multi-year grants. For grantees attempting to operate projects which require more than one year funding, having to apply and compete every year presents unnecessary difficulties. Thus, the Committee's intent is that this type of grant be available to those applicants who can demonstrate that a limitation of the grant to one year would significantly reduce their project's effectiveness. In addition, the applicant should be required to include a specific multi-year plan with the application. The review of continuation applications is not a competitive process, it is not subject to the review procedures required in section 2(4) of the bill. Thus, ANA can focus its review of the continuation applications (for the additional years of the grant period) on whether (1) the project plan is consistent with the multi-year plan approved as a part of the original application, (2) the grantee made satisfactory progress in the prior year, and (3) the grantee has satisfied all applicable financial and program reporting requirements. The Commissioner should give first priority to funding continuation grants. Although there is no limitation in the bill on the duration of multi-year grant awards, the Committee recommends a maximum of three years.

The second provision in section 502 requires ANA to establish a formal panel review (i.e field reader) process for reviewing applications for financial assistance. Consistent with ANA's current practice, the amendment also requires that in selecting reviewers, the Commissioner give preference to American Indians, Hawaiian Natives, American Pacific Islanders (including American Samoan Natives), and Alaskan Natives. In no case may any official or employee of ANA sit on a review panel. Following the review of applications, each review panel must rank them in the order of their relative merit. These lists will be submitted to the Commissioner.

Title V leaves to the Commissioner's discretion the method to be used in combining the lists if more than one review panel is used. Additionally, the Commissioner may select any of the applications for funding in any order he chooses. The Committee wishes to strongly emphasize there is no intention to limit the Commissioner's grant making discretion. What the amendment provides is that in each instance he selects an application for funding ahead of another application which the review panel(s) identified as superior in merit, he must make a record explaining the reasons for his selection. These reasons must detail why he selected this application and why he did not select the other application(s) ranked superior in merit. After the Commissioner makes the grant awards, the chairman of the Select Committee on Indian Affairs of the Senate or the Chairman of the Committee on Education and Labor of the House of Representatives may request the following documents: (1) the rankings submitted to the Commissioner by the review panel(s);

(2) a list of the applications approved for awards; and (3) the record containing the Commissioner's reasons for deciding not to follow the list of ranked applications. These documents would be made available to the named committees, but only upon the request of the Chairman of either committee. It is not the intention of the Committee to require routine submission of such materials as grant applications or ratings of applications by individual reviewers.

Section 503 amends the Act by establishing a new section 814 with new rulemaking provisions. The first provision makes the Native American Programs Act subject to the Administrative Procedure Act, with the exception of one provision—when the Commissioner of the ANA for good cause finds that notice and public procedure are not practical, unnecessary, or contrary to the public interest. Other than this one exception, the ANA must publish in the Federal Register, as a notice of proposed rulemaking, all changes in general statements of policy, application requirements of priorities, other grantee or program requirements, as well as any changes in ANA organization, procedure, or practice. ANA must also afford interested parties at least thirty days to comment on the proposed rule before it can be published in final form. This is intended to curtail the ANA practice of simply announcing changes in policy or specific requirements without public comment. An example of this was contained in the August 12, 1985 program announcement (50 Federal Register 32542)—"The following activities are inconsistent with the policies of ANA: . . . ('third party Training & Technical Assistance')." Although not prohibited by section 805 of the Act, ANA nonetheless decided, without soliciting Indian, Alaskan, and Hawaiian input that they would not support this method of providing training and technical assistance. This type of policymaking is clearly not consistent with the Federal policy of Indian Self-Determination.

The second provision in section 503 requires ANA to place in all published rules, citations of legal authority authorizing the particular action. Legal authority includes applicable statutes, regulations, case law, executive orders, and Office of Management and Budget Circulars.

The third provision provides that, when it becomes necessary or appropriate to issue a rule following the enactment of a law, the new rule must be published in final form within six months.

The fourth provision requires ANA to transmit a copy of each published rule to the House of Representatives and to the Senate.

The fifth provision amends the Act's definition by stipulating that the meaning of the term "rule" as used in the Act is the same as the one used in the Administrative Procedure Act.

Section 504 provides for the inclusion of Native American Pacific Islanders (including American Samoan Natives) as eligible groups to be served by the ANA programs. Under this provision, the Secretary is authorized, subject to the availability of funds appropriated specifically for them, to provide financial assistance to public and nonprofit private agencies serving Native American Pacific Islanders (including American Samoan Natives).

Section 505 provides for the authorization of appropriations for the Native American Programs Act for fiscal years 1987, 1988,

1989, 1990, and 1991. It also authorizes appropriations in the amount of $500,000 for fiscal years 1987, 1988, 1989, 1990, and 1991 specifically for the propose of providing financial assistance to Native American Pacific Islanders (including American Samoan Natives).

Section 506 provides for the authorization of a demonstration revolving loan project for Native Hawaiians. Under this provision a state agency or community-based Native Hawaiian organization will work with the Secretary to administer the loan program to Native Hawaiian organizations and to individual Native Hawaiians. The loan program is authorized for 60 months and $3,000,000 is authorized.

ANA assistance to date has mostly been in the form of grants and contracts to a broad range of eligible native entities. A loan program would complement this assistance by targeting a very real problem—direct access to capital.

While Native Americans are eligible for minority business assistance programs, they have a very poor record of actually receiving assistance. Native Americans do not historically have a capitalist tradition upon which to compete in a capitalist society. The purpose of this demonstration project is to determine whether Native Americans can benefit from additional community based assistance.

Native Hawaiians have been targeted as the recipients for this project because:

(1) They are not eligible to participate in BIA loan programs.

(2) Hawaiians, unlike Indian tribes, do not have a sovereign political entity, existing management organizations or tax benefits to assist in the accumulation of capital. Native Hawaiians, who face the same obstacles as Indians, must accumulate capital as private citizens, at least until they become recognized as a sovereign political entity.

(3) Hawaiians would not be included in any of the economic development proposals currently moving through committee (Indian Development Finance Corporation, Indian Enterprise Zones, Buy Indian Act).

(4) Hawaiians have been statistically shown to be at the bottom of minority groups in Hawaii that receive minority business assistance. While Hawaiians account for 20% of the population, they account for only 3.6% of minority-owned businesses in Hawaii, and 1% of gross receipts of minority-owned businesses in Hawaii. Hawaiian small businessmen are unable to secure loans because they do not qualify and often lack collateral and are thus a poor risk to lenders. The current lack of concentrated support services to Hawaiians reflect the greatest barrier for Hawaiian participation in Hawaii's small business community.

The following summary was prepared at the request of the Committee by Paul Alexander, attorney-at-law, Washington, DC, to respond to the question of the trust relationship between the Federal Government and Native Hawaiians.

The Federal Government has a trust relationship to Native Hawaiians. The relationship is premised on the course of dealings of the United States and its citizens with Native Hawaiians and their

government, the explicit recognition of the relationship by the United States Congress in establishing the Native Hawaiian Home Lands Commission, the recognitiion of the special status of Native Hawaiians in Hawaii Statehood Act, and the recognition by the federal courts of the relationship. While most commentators agree that a trust relationship exists, there is little agreement as to the exact nature of the obligations implicit in the relationship. It is probable that until Native Hawaiian issues are addressed on a comprehensive basis, such as they have been to some extent for many Indians and Alaskan Natives, the extent of the trust relationship for Native Hawaiians will remain unsettled. What is clear, however, is that Congress does possess the authority, pursuant to the Federal-Native Hawaiian relationship to enact legislation that is rationally related to the purposes of the trust relationship—to legislate for the benefit of Native Hawaiians.

The Hawaiian Question

The issue of the nature of the Federal-Hawaiian Native relationship usually occurs in one of two contexts: (1) whether the relationship has been such that Native Hawaiians have a legal and/or moral basis for claims against the United States; or (2) whether the relationship is such that it justifies the provision of federally funded services to Native Hawaiians. The weight of opinion in Hawaii with respect to the issue of claims is definitively affirmative. Although many of the underlying events and legal analysis relating to claims are relevant to the issue of services, this paper only addresses the services issue.

The services question has sometimes been phrased as whether Native Hawaiians are "Indians" for the purposes of the Federal trust relationship, and whether therefore they can be included within any of the various programs that have been developed for Indians. While a number of legal arguments can be constructed to address the question of whether Native Hawaiians are legally the same as Indians;[1] these formulations do not clearly address the underlying issue. When Congress has determined that a trust relationship exists for an "indigenous group" within its political boundaries, Congress has the authority and the power to determine the perimeters of the social service aspect of that relationship. Whether services for Native Hawaiians should be identical to Indian services, provided through the same delivery systems, or different delivery systems, or a mix thereof, become policy issues. Issues that most likely will be influenced by the particular needs being addressed and the determination of the most effective delivery mechanisms that can be utilized to meet those needs. The key question is therefore—is there a identifiable Federal-Native Hawaiian relationship

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[1] The argument is based on applying considerations set out in Cohen's *Handbbok of Federal Indian Law, infra,"* n. 8, that "singly or jointly, have been relied upon in reaching the conclusion that a group consitutes a tribe" of Indians. These include the treaties between the U.S. and Hawaii; recognition of Hawaiians as an aboriginal group in various Congressional Acts; collective rights in rights in land under the Hawaiian Homes Commission Act; and recognition of Hawaiian Natives as an aboriginal group by other Native groups. *Contra,"* Price v. State of Hawaii, 764 F.2d 623 (9th Cir. 1985) applying recognition criteria to a specific Hawaiian entity.

In addressing the above question it is helpful to review the Federal-Indian relationship and how it relates to the provision of social services. Much of the relevant law and underlying concepts concerning trust relations were formed to justify land transactions between Indian tribes first with the colonial European powers, then with the colonies, and finally with the United States. There are functional and legal analogies to be drawn between the Indian experience in North America, and the Native Hawaiian experience in dealings with the Western-European Colonial powers, the Republic of Hawaii, and the United States. The analogies are striking. What is also striking is the similarity of consequences. Both Indians and Hawaiians were left with a fraction of their original lands, and with severe social and economic consequences.

Services and the Federal-Indian Relationship

A key concept of the Federal-Indian Relationship is the Federal trust responsibility. Chief Justice John Marshall in two related cases, *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831), and *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), described Indian tribes as "domestic dependent nations" and characterized the relationship of the United States to the Indian tribes as one that "resembles that of a ward to his guardian." The responsibility to deal with Indians was constitutionally assigned to the Federal Government. This responsibility has become universally known as "the trust relationship." It is important to note that the responsibility has never been fully defined. Because a concrete definition of the trust responsibility might fail to take into account changing conditions and changing needs, the relationship can be described but not defined with any exactness. Indian people tend to define the trust as the responsibility that the Federal Government assumes from the operation of International law, the constitution, treaties and practice for the property and the well-being of Indian people.[2] There are both mandatory and permissive aspects of the trust relationship. Because of the Federal-Indian relationship, the U.S. must exercise certain fiduciary standards with respect to Indian property. The existence of the relationship is also the basis for the provision of services that are not necessarily mandatory. The difference between what is a trust right and what is a trust-based service, often the subject of hard fought political and legal battles, is only occasionally a key issue in the actual delivery of services.[3] In what can be labeled the "trust mandated" or trust right situation, the beneficiaries can hold the trustee accountable, either in terms of monetary damages or equitable enforcement. In what can be termed the trust-based situation, Congress can provide distinct services to Indians; services that are insulated from challenge under the equal protection standards of the fourteenth amendment and similar standards incorporated in the fifth amendment to the Constitution.[4] Although Indians may not be able to require the

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[2] See, e.g. U.S. Congress, American Indian Policy Review Commission, Final report of the American Indian Policy Review Commission (Washington, D.C.: U.S. Government Printing Office, 1977)

[3] See White v. Califano, 437 F. Supp. 543 (D.S.D. 1977), *aff'd* 581 F.2d 697 (8th Cir. 1978) and McNabb v. Heckler, N. CU-83-051-GF (D. Mont. 1986).

[4] Morton v. Mancari, 417 U.S. 535 (1974).

United States to maintain a particular service or to provide damages for its withdrawal, in the trust-based situation, the existence of the trust does require that the government observe certain due process procedures in the provision of such services that may not be otherwise required of a discretionary social service program.[5]

Indian people tend to assert that many of the social services that are provided, such as health and education, are services mandated by the trust responsibility. The Executive Branch often argues that most Indian services are at best premised on the trust responsibility but are not required (trust-based). It argues that only services associated with trust property are the "true" trust services. Congress which constitutionally has the power to determine the extent of the trust, generally avoids the issue of determining whether any particular service is required by the trust relationship.[6] These issues are only infrequently addressed by the Courts, and when they are, they come up in unique factual situations, so that the issue of what services are trust rights or simply trust based is likely to remain unsettled. However, it is clear under *Morton* v. *Mancari* that in order for the federal goverment to provide programs to a distinct class of persons—Indians—the government purpose in the program need only to be rationally tied to the United States' trust obligation to such Indians.

There is a third class of services to which Indian tribes and people have access. These generally are services that are created by Congress to meet a defined social need and Indians are included as one of the many beneficiary groups. Although the trust relationship provides a basis for defining Indians as an eligible class in the general legislation, usually along with a determination of need, analytically such programs are neither trust mandated services, nor strictly speaking services based on the trust responsibility.

Services and the Federal-Native Hawaiian Relationship

Unless Congress clearly established that a particular service is a right under the trust relationship, e.g. the Hawaiian Homes Commission Act, the federal services provided to Hawaiian Natives usually fall within the categories of trust-based services or eligible class services.

To date, Congress has legislated for the benefit of Native Hawaiians in the below listed programs:

Hawaiian Homes Commission Act, 42 Stat. 108 (1921) provides homesteads to Native Hawaiians.

Leases in Hawaii National Park made available to Native Hawaiians, 16 U.S.C. sec. 396a (1938).

Native Hawaiians made an eligible class for services under the Administration for Native Americans, P.L. 93-644 (1974).

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[5] See e.g, Fox v. Morton, 505 F.2d 254 (9th Cir. 1974); Vigil v. Andrus 667 F. 2d 931 (10th Cir., 1982); and Wilson, v. Watt, 703 F.2d 395 (10th Cir. 1983).

[6] But see, The Indian Health Care Improvement Act findings which state: ". . . health services to maintain and improve health of Indians are consonant with and required by the Federal government's historical and unique relationship with, and result in responsibility to, the American Indian people." 25 U.S.C. sec 1601.

Native Hawaiians made an eligible class for services under the Comprehensive Employment Training Act, P.L. 93-203 (1977).

Native Hawaiians included as a covered class in the Indian Religious Freedom Act, 42 U.S.C. sec. 1966 (1978).

Native Hawaiians included as an eligible class for services under the National Institute on Drug Abuse, 21 U.S.C. sec. 1177(d) (1980.

A Native Hawaiians Study Commission was authorized, 94 Stat. 3321 (1980).

Native Hawaiians included as an eligible class for services under the Job Training Partnership Act, P.L. 97-300 (1982).

Secretary of Health and Human Services directed to conduct a comprehensive study of the health care needs of Native Hawaiians, P.L. 98-396 (1984).

Native Hawaiians included as eligible class for services in Carl D. Perkins Vocational Education Act, P.L. 98-524 (1984)

Native Hawaiians included as an eligible class for services under Library Services and Construction Act Amendments, P.L. 98-480 (1984).

Native Hawaiians included as an eligible class for whom priority was provided in Institutional Aid programs in Higher Education pursuant to the Conference Report on Fiscal Year 1985 Appropriations for the Departments of Labor, Health and Human Services, and Education, Conf. Rept. No. 98-1132, (1985).

Native Hawaiians included as an eligible class for whom priority was provided in the creation of Parental-Child Development Centers pursuant to the Conference Report on Fiscal Year 1985 Appropriations for the Departments of Labor, Health and Human Services, and Education, Conf. Rept. No. 98-1132, (1985).

Native Hawaiians included as eligible class for services in Anti-Drug Abuse Act of 1986, P.L. 99-750 (1986).

Grant authorized for Native Hawaiian Culture and Arts Development Program in Higher Education Amendments of 1986, P.L. 99-498 (1986).

The Basis of the Federal-Hawaiian Native Relationship

Most commentators and courts that have explored the question of the Federal-Hawaiian Native trust relationship have concluded that although the perimeters are not defined, as they are also not completely defined for Indians, such a trust relationship exists.[7] It is based on the dependency of the indigenous Hawaiian Natives, and the recognition by the United States Congress of that status in the annexation of Hawaiian Islands, the establishment of the Hawaiian Homes Commission, and the Hawaiian Admissions (statehood) Act.

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[7] The Hawaiian Study Commission majority report acknowledges a "very limited special trust" and the minority report argues for a broader trust. Either view would support rationally related services.

Felix Cohen's Handbook on Federal Indian Law [8] is the most prestigious and comprehensive treatment of legal theory and case pertaining to Native Americans in the field. The 1982 edition says of Native Hawaiians:

> * * * They are a people indigenous to the United States * * * however * * * they have not been dealt with comprehensively by Congress.
>
> * * * * * * *
>
> * * * the full extent of the trust obligation owed by the United States to Native Hawaiians and the manner of its fulfillment has not been fully defined.[9]

The Congressional Research Service in response to a request from Senator Inouye reviewed the question and concluded:

> The courts have upheld the power of Congress to single Indians out for special treatment because of their unique status under the Constitution and treaties, and have inferred a trusteeship obligation on the part of the United States toward the aboriginal people that constitute the original inhabitants of lands now within the borders of the continental United States. . . . The same reasoning that was used to infer a trust relationship between the United States government and the Indian tribes would seem to be capable of being applied to the relationship with Native Hawaiians.[10]

Several federal courts and the Supreme Court of Hawaii have had to address the issue of whether a trust relationship exists for Native Hawaiians and all have concluded that it does. Perhaps the most misunderstood case in the area is *Keaukaha-Pananewa Community Association* v. *Hawaiian Homes Commission*,[11] known as *Keaukaha I*. This case considered whether a group of Native Hawaiians had standing as private parties to bring suit in federal court under the Hawaiian Homes Commission Act and/or the Hawaiian Admissions Act to prevent the Commission from transferring certain trust lands. Although the Court was clear that a trust for the benefit of Native Hawaiians had been established by these Acts, the administration of which was primarily with the state of Hawaii, the Court determined that a Federal question did not exist and that state court was the proper forum. In reaching the conclusion the 9th Circuit stated:

> It is clear, however that for all practical purposes these benefits have lost their federal nature.[12]

It has been suggested that this dicta of the 9th Circuit may be a barrier to asserting a Federal-Hawaiian Native Trust relationship. The statement or dicta should be understood in the context of *Keaukaha I* being a case pertaining to availability of remedies, not

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[8] 1982 Edition.
[9] *Ibid*, at 797-798.
[10] November 2, 1983 memorandum from the Congressional Research Service, Library of Congress, to Senator Daniel K. Inouye, *Definition of Native Hawaiians*, at 1-2.
[11] 588 F.2d 1216 (9th Cir. 1978).
[12] *Ibid*, at 1226.

a case defining rights. The unavailability of a currently viable remedy does not negate the fact that a right exists. Paradoxically, rights and remedies do not necessarily run together. It is quite clear in federal Indian law that many Indian "rights" have been what Justice Frankfurter once termed "hortatory". Special acts of Congress have been required to vindicate such rights.[13] The fact that a number of Indian rights currently require remedies in State forums rather that Federal forums does not convert the Federal Indian right into a State right.[14]

A more recent case involving the identical underlying factual issues and parties as *Keaukaha I,* known as *Keaukaha II* [15] determined that the trust relationship reflected is the Hawaiian Homes Commission Act and the Hawaiian Admissions Act was a federal right enforceable under the 42 U.S.C. Sec. 1983, a reconstruction era civil rights statute. This decision should end any confusion over Hawaiian rights that remained under *Keaukaha I.* Section 1983 actions are premised on the deprivation under the color of state law of a federal right. The Federal right required for the application section 1983 is the finding that the Hawaiian Admissions Act clearly "mandates the establishment of a trust for the betterment of native Hawaiians."

The Supreme Court of Hawaii in *Ahuna* v. *Department of Hawaiian Home Lands,* 64 Haw. 327, 640 P. 2d 1161 (1982) also has addressed the issue of Federal-Hawaiian Native Trust relationship in order to determine the obligations of the Hawaii State Department of Hawaiian Home Lands in administering the lands that had been set aside by Congress for Native Hawaiians in the Hawaiian Homes Commission Act. The Court determined that: (1) the legislative history of the Hawaiian Homes Commission Act indicates that the United States "stood in a trusteeship capacity to the aboriginal people" of Hawaii; and (2) the primary purpose of the Act "was the rehabilitation of native Hawaiian". The Hawaiian Supreme Court then utilized Federal-Indian law to determine the state agency's fiduciary obligation, as the instrumentality for effectuating the Federal purpose.

Also implicit in the *Ahuna* decision is the determination that special programs for the benefit of Native Hawaiians are not constitutionally suspect racial discrimination. The applicable prinicples of analysis are from Indian law. The U.S. Supreme Court determined in *Morton* v. *Mancari* [16] a federal employment preference for Indians was not unconstitutional racial discrimination, but rather a reasonable exercise of federal discretion to implement its trust relationship with Indians. Indians for the purposes of the trust relationship are not a "race", but rather what has been termed a political classification. Case law indicates that programs, functions or services need only be "rationally related" to the purposes of the trust to pass constitutional muster.[17]

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[13] The establishment of the Indian Claims Commission was in direct response to the inability to otherwise pursue claims.

[14] See e.g., P.L. 83-280 which permitted states to assume specified jurisidiction over Indians.

[15] Keaukaha-Panaewa Community Association v. Hawaiian Homes Commission, 739 F.2d 1467 (9th Cir. 1984).

[16] *Morton* v. *Mancari,* 417 U.S. 535 (1974).

[17] *Deleware Tribal Business Council* v. *Weeks,* 430 U.S. 73 (1977).

The Attorney General of the State of Hawaii had to address the question of potential unconstitutional discrimination when the State of Hawaii established the Office of Hawaiian Affairs, all of whose trustees must be Native Hawaiians, and elected by Native Hawaiians. Utilizing Indian law principles, the Attorney General of Hawaii in a written advisory opinion (Opinion No. 80-8, July 8, 1980), determined that the Office of Hawaiian Affairs was a rational means of effectuating the state's obligation under the trust relationship to Native Hawaiians. This judgment is consistent with federal and state judicial decisions sustaining state action that are carried under federal authority to further the Federal trust responsibility.[18]

The Historical Relationship

A review of the history of relations between Hawaiian Natives and the United States demonstrates that are significant parallels to aspects of U.S.-Indian history and gives credence to the observations of the commentators and the Courts that a Federal-Native Hawaiian Relationship exists.

It is been estimated that approximately 300,000 native people occupied the "Sandwich Islands", as Hawaii was then called when Western society discovered them in 1778. The indigenous Hawaiians had a complex political and economic but self-sufficient system in existence at time of contact. The system has been compared to the feudal system of medieval Europe. Private property—see simple title—did not exist. Land occupancy rights ran from greater lords to lesser lords to commoners; obligations ran in reverse order.[19] Major differences did exist: land use rights were personal and did not necessarily pass to heirs; and "commoners" were not tied to the specific lords or land and could move. Each island was autonomous until 1810 when Kamehameha I united the Islands by conquest and negotiation.

Certain similarities to the Indian situation at the time of discovery are pertintent. Both populations were politically autonomous, and both populations were self-sufficient in their traditional economies and life styles. Neither population had a private property system; but they did however control most, and in some cases all, of the lands within their political boundaries.

All of these situations would change. The various ways that Indians lands have been alienated from Indian ownership has been documented in proceedings of the Indian Claims Commission, and other sources. Interestingly, treaties which have become a major source of evidence in establishing a trust relationship, were often the instruments of land loss. The role of the United States in these transactions was fairly clear, it either directly obtained the Indian land or failed to protect the tribes in their land dealings.

The role of the United States in the Hawaiian loss of land was different in form than in the Indian situation but just as central. Treaties with the Native Hawaiian government were not generally land transactions but were means of assuring commercial access.

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[18] See, R. Johnson and E.S. Crystal, Indians and Equal Protection, 54 Wash. L. Rev. 587 (1979).

[19] N. Levy, Native Hawaiian Land Rights, 63 Cal. L. Rev. 848 (1975) provides an extensive discussion of these matters and is relied upon throughout this paper.

The first treaty of peace and friendship proposed in 1826 was not ratified by the United States.[20] The first ratified treaty (1849)[21] dealt with friendship, commerce and navigation. A second treaty was entered into in 1875; dealing with commercial reciprocity.[22] A final treaty, also concerning commercial reciprocity was entered into in 1884.[23] Throughout the 19th century, it would be the American merchants along with American missionaries who under the auspices of "civilizing" a system they felt was culturally inferior to their own would intervene with the military support of the United States government in internal Hawaiian affairs. This active intervention first focused on access to Hawaiian commercial timber, then after the trees were depleted switched to access to the land itself for the establishment of the plantation economy that would dominate Hawaii in the second half of the nineteenth century. This interference would find early expression in the western style constitution of 1840 and culminate in an insurrection against the Hawaiian monarchy.

During the first half of the 19th century, the merchants were supported by their respective Governments (French, British and American) by the use of naval war ships.[24] In the effect the Westerners, and eventually the United States, using the threat of military force reduced the Kingdom of Hawaii to the functional equivalent of a dependent sovereign—a suzerainty.

The influence of the western powers was greatly felt in the land system:

> By 1845, the land tenure system could neither maintain itself in the face of a hostile foreign world or accommodate itself to the wishes of that world.[25]

A land Commission dominated by Westerners was appropriated. It would oversee the "Great Mahele"; the end of the traditional Hawaiian land system and the substitution of a more western style system of fee ownership. Cohen points out that:

> By destroying the interlocking communal nature of land tenure its [the Great Mahele] effect was similar to allotment and termination acts on the mainland.

Land rights were concentrated in the hands of the very few. The King and the chiefs held title to 99 percent of all the lands. Many of the commoners who lived on the land were not permitted a realistic opportunity to obtain title to their lands. In a process not dissimilar to that which occurred with Indian lands after allotment, title to much of the land was soon transferred to Non-Hawaiian ownership. Large plots of lands owned by royalty no longer had communal obligations attached and were therefore not productive without western capital or management systems. They were sold off at "distress prices" and fraud was not uncommon; ultimately a

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[20] Treaty with Hawaii on Commerce, Dec. 23. 1826, United States-Hawaii, 3 C. Bevans, Treaties and Other Internal Agreements of the United States, 1776–1949, at 861 (1971).
[21] Treaty with Hawaii on Friendship, Commerce and Navigation, Dec. 20, 1849, U.S.-Hawaii, 9 Stat. 977.
[22] Treaty with Hawaii on Commercial Reciprocity, Jan. 30, 1875, U.S.-Hawaii, 19 Stat. 625.
[23] Treaty with Hawaii on Commercial Reciprocity, Dec. 6, 1884, U.S.-Hawaii, 25 Stat. 1399.
[24] Levy, *supra*, n.16 at 852.
[25] *Ibid*, at 853.

plantation economy with imported non-Hawaiian labor was firmly established. Small plots were also uneconomical and most were soon lost.

All commentaries seem to agree that in the second half of the 19th Century a small number of Westerners (2000) came to control most of the land in Hawaii:

> Native Hawaiians had been excluded from the mainstream of the economy; they had lost ownership of most privately held land and had been reduced to a minority of the inhabitants of the Kingdom. [26]

Control of land, however, was not enough. The Westerners who by the latter part of the nineteenth century were primarily Americans, sought political control. As noted previously the first Hawaiian constitution of 1840 was procured by western influence. The constitution of 1887, known as the "Bayonet Constitution" was forced on the Monarchy by armed merchants—American citizens. This constitution restricted the right to vote to those who paid taxes, including non-citizens. Native Hawaiians were disenfranchised and the American merchants obtained a virtual dictatorship.

At this point, although legally part of a foreign state, the American merchants felt that they were "part of the American system"; a view publicly echoed by U.S. Secretary of State Blaine. However, the imposition of the "McKinely tariff" on foreign sugar (including Hawaiian sugar) created a significant economic crisis. Sugar fell from $100 a ton to $60 a ton and property values collapsed in Hawaii. [27]

The last royal ruler of Hawaii, Queen Liliuokalani, came to the throne in 1892 and attempted to replace the "Bayonet constitution" with a new one that would have significantly eroded western power. Foreigners were to be precluded from obtaining citizenship or from voting. In January 1893, shortly before the new constitution was to go into effect, and while President Harrison, who favored annexation, was still in office, armed American merchants, aided by the U.S. minister in Hawaii, John L. Stevens, and marines from the U.S.S. Boston forced the Queen to relinquish her governmental authority.

A provisional government dominated by American merchants was established. This government immediately sought annexation by the United States. The goal of annexations however, would take a few years. Assuming office shortly after the overthrow of the Queen, President Cleveland, supported by the Blount report [28] refused to support annexation.[29] The Blount Report found that the overthrow of the Queen had been illegal; and recommended that she be restored to power. The Provisional government of Hawaii re-

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[26] Cohen. *supra*, n.8, at 800.

[27] S. Morrison and H.S. Commanger, The Growth of the American Republic, 5th Ed., Vol. 2 (1962).

[28] James Blount was the former Chairman of the House of Representatives Committee on Foreign Affairs, appointed as Special Commissioner to Hawaii. See, Kuykendall, *The Hawaiian Kingdom, The Kalakaua Dynasty* (1967) for an in depth treatment of this era in Hawaiian affairs.

[29] President's Message Relating to the Hawaiian Islands, H.R. Exec. Doc. No. 47, 53rd Cong., 2d Sess., XIV-XV (1893).

fused to follow Blount's recommendations and instead established the Republic of Hawaii. The Republic thereupon took over all crown and government lands without compensation.

Another report on the overthrow of the Queen and the propriety of annexation would be prepared by the Senate Foreign Relations Committee; it is known as the Morgan Report.[30] The Morgan Report approved the United States support of the merchants. It used a familiar theory . . . determining Hawaii to be a dependent sovereignty of the United States. An analogous theory to that used in the landmark decisions that gave judicial recognition to the Federal-Indian relationship, *Worcester* and *Cherokee Nation.* The report stated:

> [It] is a recognized fact that Hawaii has been all the time under a virtual suzerainty of the United States . . . a de facto supremacy over the country.

A "suzerainty" was understood in International law to be the relationship that a more powerful sovereign has over a dependent one; the dependent sovereign was usually viewed as less "civilized" than the powerful sovereign.

After the Morgan Report, by a joint resolution of Congress the United States annexed Hawaii in 1898.[31] Cohen states that with annexation "Native Hawaiians became a dependent indigenous people of the United States." [32]

Native Hawaiian conditions which were stressed at the time of annexation continued to deteriorate. Indian conditions were at same time also suffering from similar circumstances; loss of traditional life styles and food resources; loss of the native land base; and destruction of traditional modes of self-government. By the 1920's, reformers were concerned about the conditions of Native people. For Indians, the Red Cross survey of conditions, and the Meriam Commission report would result in a partial reversal of many of the policies of the 19th century.

For Hawaiians Natives the concern would focus in the Hawaiian Homes Commission Act.[33] The Act set aside 200,000 acres of land to be leased at nominal rates for 99 years to Native Hawaiians. Congress viewed the Hawaiian Homes Commissions as a "plan for the rehabilitation of the Hawaiian Race." The bill was introduced by the nonvoting Delegate from Hawaii, J.K. Kalanianole, a member of the royal family of Hawaii based on a plan developed by Senator Wise of the Legislative Commission of the Territory of Hawaii.

The Hawaiian Homes Commission Act also addressed another concern prevalent at the time. This was the concern of many of "growers" whose long term leases on their plantations were expiring, that under the homesteading laws applicable in the territories, that much of "their land" could be lost to homesteading. These hundreds of thousands of agricultural acreas were removed from the Homesteading provisions.

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[30] S. Rep. No. 227, 53rd Cong., 2d Sess. (1893).
[31] 30 Stat. 750 (1898).
[32] Supra,n. 8, at 802.
[33] 42 Stat. 108 (1921).

Hawaiians were thought to be a dying race, numbering a scant 22,500 in 1920. The House Committee Report [34] on the Homes Commission quotes from the hearing record to establish the cause of the problem it was attempting to remedy.

> Secretary [of the Interior] Lane. One thing that impressed me . . . was the fact that the natives of the islands who are our wards, I should say, and for whom, in a sense we are trustees, are falling off rapidly in numbers, and many of them are in poverty . . .
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> * * * * * * *
>
> Mr. MONAHAN. What caused this dying away of race. . .
>
> Secretary LANE. . . . . It is always incident to the comings of civilization and we always carry disease germs with us to which these people are not immune . . .

The Committee's response to any challenge to the bill's constitutionality as "unconstitutional class legislation" was to point out, among other arguments, that Congress had the authority to provide special benefits for unique groups such as "Indians, soldiers and sailors . . .". This is the same argument in embryonic form, that the Supreme Court would later use in *Morton* v. *Mancari* to sustain special programs for Indians. The Hawaiian Homes Commission Act is universally viewed as Congress' recognition of the special relationship the United States has to Native Hawaiians.

When Hawaii became a state in 1959, the dominant federal-Indian policy was then the termination of Indian reservations and the transfer of much Federal administrative responsibility to States. It is therefore not surprising that the Hawaiian Homes Commission was made part of the responsibilities of the State of Hawaii upon Hawaii's admission to the union. Since the rights involved were Federal, Federal responsibility was retained. Any changes proposed by the State that could impair Hawaiian Native rights require Congressional consent, and the United States is the only party with specific standing to sue in federal courts to enforce the provisions of the trust. [35]

Another important provision was also included in the Admission Act that demonstrates Congresses' denotation of Native Hawaiians as a special beneficiary group. That provision, required the State of Hawaii to utilize the income and proceeds from lands the United Stated ceded to Hawaii for the benefit of the people of Hawaii, and specifically Native Hawaiians. Again the United States retained a supervisory trustee role. [36]

Since statehood Congress has periodically legislated for the benefit of Native Hawaiians. [37] It has not, however, comprehensively addressed Hawaiian Native issues. This situation is not entirely different from the Federal-Indian relationship, which also has not been comprehensively spelled out. Many of the Indian programs are premised on general statutory authority. The Executive branch

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[34] H. R. Rep. ANo. 839, 66th Cong., 2d Sess. 4 (1920).
[35] P.L. 86-3, set out in full in 48 U.S.C. prec. sec. 491.
[36] 73 Stat. 4, sec. 5(f) (1959).
[37] See the discussion on pages 6-7.

has been allowed great latitude in defining the nature and scope of programs. [38] Absent an express direction from Congress, the agencies operating federal programs have not included Hawaiian Natives. Although it is possibly administratively feasible to include Hawaiian Natives, given the broad discretion asserted by federal agencies, inclusion of the Hawaiian Native population in federal programs by agency action is not very likely. Department of the Interior regulations on tribal recognition apply only in the continental United States and therefore exclude Hawaiians.[39] Furthermore much agency activity in the last decade has focused on reducing beneficiaries by narrowing eligibility criteria.

In many ways, native Hawaiian issues resemble those of Native Alaskans prior to the Alaska Native Claims Settlement Act. In addressing the issue of whether "Eskimos" were "Indians" even though not of the same racial origin, courts have determined that the term "Indians" is not a racial classificaiton but a term of art for the aboriginal peoples of America.[40] "Alaskan natives were sometimes included in Indian programs, although not always. Periodically programs were passed for Alaskan Natives that did not have Indian counterparts.[41] Alaskan Natives with several exceptions did not have reservations or trust lands. In addition to resolving Alaskan land claims, the Settlement Act provided for a comprehensive definition of Alaskan natives, and the creation of a series of entities, including existing traditional Native villages, as the mechanisms for land holding as well as service delivery. These mechanisms which have no counterpart in Indian affairs in the lower forty-eight states, but have become routine parts of the Federal-Alaskan Native relationship.

Many distinct issues, and many divergent views exist on the subject of Hawaiian Lands Claims. Absent such a comprehensive approach to Hawaiian issues, as was provided for Alaskan Natives by the Alaskan Claims Settlement Act, or some other comprehensive mechanism, Congress will on a by-case basis whether any particular program should be part of the Federal-Hawaiian relationship. As Cohen has stated". . . there is no reason to doubt that Congress has power to legislate specifically for the benefit of Native Hawaiians". [42]

Committee Recommendation and Tabulation of Vote

The Select Committee on Indian Affairs, on July 30, 1987, with a quorum present, adopts by a unanimous vote Title V of S. 887 and votes to report out favorably S. 887 as amended.

Section-by-Section Analysis

Section 501.—Provides that the title of this act may be cited as the "Native American Programs Amendments of 1987."

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[38] *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974) "the power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left implicitly or explicitly by Congress."

[39] 25 C.F.R. 54.2.

[40] *Pence* v. *Kleppe*, 529 F. 2d 135 (9th Cir. 1976).

[41] For example the importation of Reindeer for benefit of Alaskan Natives, 25 U.S.C. sec. 500.

[42] Supra, n. 8, at 803.

Section 502.—Amends section 803(a) to permit the Secretary to award grants on a single year or multiyear basis, and provides that the Secretary shall establish a formal review process for the purpose of evaluating applications for assistance. It further provides that certain review documents shall be provided to the Chairman of the Select Committee on Indian Affairs of the Senate or the Chairman of the Committee on Education and Labor of the House of Representatives following the awarding of grants. This information will be provided to these Committees upon the request of each Committee Chairman.

Section 503.—Provides that the program authorized by this Act shall be subject to the Administrative Procedure Act, with certain exceptions, and clarifies the definition of the term "rule."

Section 504.—Provides that public and nonprofit private agencies serving Native American Pacific Islanders (including American Samoan Natives) are eligible to apply for financial assistance pursuant to the Native American Programs Act, subject to the availability of funds appropriated specifically for these groups.

Section 505.—Authorizes appropriations for the purpose of carrying out the provisions of the Native American Programs Act for fiscal years 1987, 1988, 1989, 1990, and 1991. Also authorizes appropriations in the amount of $500,000 for fiscal years 1987 through 1991 for the purpose of providing financial assistance to Native American Pacific Islanders (including American Samoan Natives).

Section 506.— Provides that a demonstration revolving loan fund would be created to provide funding that is not available from private sources to meet the stated ANA goals of economic and social self-sufficiency. The Secretary would act through a state agency or community-based Native Hawaiian organization to make loans to Native Hawaiian organizations and to individual Native Hawaiians. Payments, interest, and any money collected would be put back into the loan fund. Loans would only be made after a determination is made that the borrower is unable to obtain financing from other sources, and that there is reasonable prospect for repayment. Loans would be made for a term that does not exceed 5 years. The Treasury Secretary would determine the rate of interest based on the market yield of municipal bonds. The Secretary may require the borrower to provide collateral, and many cancel, adjust, or reduce the amount of the loan if he determines that it is uncollectible, and would be in the best interest of the United States. The fund shall pay for expenses incurred by the Secretary in administering it, and shall pay for competent management and technical assistance to borrowers for loans to assist borrowers in meeting objectives of the loan. No loans shall be made from the fund upon expiration of the 60 month period following the date of enactment of the Act. $3,000,000 shall remain available until expended, without fiscal year limitation. On or before the expiration of the 48 month period following enactment, the Secretary, is consultation with the community-based Native Hawaiian organization, shall report to Congress on the effectiveness of the demonstration program, and whether it should be expanded and extended. This section becomes effective 90 days after the date of enactment of this Act.

Legislative History

Senator Inouye introduced S. 142, the Native American Programs Amendments Act of 1984 on January 6, 1987 for himself and Senators DeConcini, Matsunaga, Murkowski, Melcher, Burdick, and McCain. The bill was subsequently referred to the Select Committee on Indian Affairs for consideration. On January 23, 1987, the Select Committee on Indian Affairs marked up S. 142, and by adoption of an amendment in the nature of a substitute, ordered S. 142 reported favorably.

On July 30, 1987, the Select Committee on Indian Affairs marked up Title V of S. 887. Title V is similar to S. 142 with the exception of two changes. The Committee adopted the text of Title V unanimously and ordered S. 887 to be favorably reported.

In the 99th Congress, Congressman Kildee introduced H.R. 3247 and Senator Andrews introduced S. 1991. Both bills were to reauthorize the Native American Programs Act of 1974 and to authorize appropriations for fiscal years 1987 through 1990. H.R. 3247 was referred to the Committee on Education and Labor. The Subcommittee on Human Resources held a hearing on September 12, 1985 and February 24, 1986. On March 20, 1986, the Subcommittee marked-up H.R. 3247. On April 10, 1986, the Committee on Education and Labor reported the bill favorably, with an amendment. The House of Representatives passed H.R. 3247 on April 21, 1986. On April 22, 1986, the Select Committee held a hearing on S. 1991 and H.R. 3247. On May 14, 1986, the Select Committee on Indian Affairs marked-up and ordered reported favorably, H.R. 3247, without amendment. H.R. 3247 was subsequently passed by the Senate, but vetoed by the President on September 26, 1986.

The President's reasons for vetoing the bill were unrelated to the substance of the program's objectives and funding. While the President declared his support for the program's objectives and funding, he objected to the new provisions added to the 1974 act that would have revised the process for applying for program grants, and would have imposed new requirements for public comment in ANA's rulemaking procedures. Since receiving the veto message on H.R. 3247, staff of the Select Committee on Indian Affairs and staff of the Department of Health and Human Service have coordinated its efforts to address the President's objections as outlined in his veto message.

Cost and Budgetary Consideration

The cost estimate for Title V, as provided by the Congressional Budget Office, is outlined below.

U.S. Congress,
Congressional Budget Office,
Washington, DC, July 31, 1987.

Hon. Daniel K. Inouye,
Chairman, Select Committee on Indian Affairs,
U.S. House of Representatives, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for S. 887, Title V, the Native

American Programs Amendments of 1987, as ordered reported by the Senate Select Committee on Indian Affairs on July 30, 1987.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

JAMES BLUM
(For Edward M. Gramlich, Acting Director).

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: S. 887, Title V.
2. Bill title: Native American Programs Amendments of 1987.
3. Bill status: As ordered reported by the Senate Select Committee on Indian Affairs, July 30, 1987.
4. Bill purpose: This bill would amend the Native American Programs Act of 1974 to extend the authorization for appropriations for Native American programs through 1991, to authorize additional funding to assist Native American Pacific Islanders, and to authorize a loan revolving fund for demonstration projects. The bill is subject to subsequent appropriations action.
5. Estimated cost to the Federal Government:

[By fiscal years, in millions of dollars]

	1987	1988	1989	1990	1991	1992
Native Americans:						
Authorization level		30.5	32.1	33.8	35.4	.....
Estimated outlays		11.0	28.7	32.6	34.2	22.6
Native American Pacific Islanders:						
Authorization level	0.5	.5	.5	.5	.5	.....
Estimated outlays	.2	.5	.5	.5	.5	.3
Loan revolving fund:						
Authorization level		3.0	.....	.....	.....	.....
Estimated outlays		.6	.6	.6	.6	.6
Bill total:						
Estimated authorization level	.5	34.0	32.6	34.3	35.9	.....
Estimated outlays	.2	12.1	29.8	33.7	35.3	23.5

The costs of this bill fall within function 500.

Basis of estimate: This bill authorizes financial assistance to public and nonprofit private agencies for projects to promote self-sufficiency for Native Americans and Native American Pacific Islanders.

Funding for Native American programs is authorized at such sums as may be necessary for 1987 through 1991. Because 1987 funds for these programs have already been appropriated, the 1987 appropriation of $28,989,000 adjusted for inflation was used to estimate the such sums authorization for 1988 through 1991.

Funding for Native American Pacific Islander programs is authorized at $500,000 a year for 1987 through 1991. Currently, the Native American Programs Act does not authorize separate funding for these programs, and no funds were appropriated for 1987. The 1987 authorization in this bill therefore represents an additional cost to the federal government.

This bill also authorizes $3 million in capital over 60 months for a revolving loan fund for projects to promote economic development among the Native Hawaiian population. The estimated cost assumes an equal disbursement of loans over the five-year life of the program.

Outlay estimates were made assuming full appropriation of estimated authorization levels. Outlays reflect the current spending pattern of native American programs.

6. Estimated cost to State and local government: The Congressional Budget Office has determined that the budgets of state and local governments would not be affected directly by the enactment of this bill.

7. Estimate comparison: None.

8. Previous CBO estimate: On February 17, 1987 CBO prepared the cost estimate of S. 142, the Native American Programs Amendments of 1987, as ordered reported from the Senate Select Committee on Indian Affairs. S. 887, Title V is identical to S.142, except that it includes the demonstration project loan revolving fund.

9. Estimate prepared by: Deborah Kalcevic and Michael Pogue.

10. Estimate approved by: C.G. Nuckols (for James L. Blum, Assistant Director for Budget Analysis).

Regulatory Impact Statement

Paragraph 11(b) of rule XXVI of the Standing Rules of the Senate requires each report accompanying a bill to evaluate the regulatory and paperwork impact that would be incurred in carrying out the bill. The Committee believes that Title V will have a minimal impact on regulatory or paperwork requirements.

Executive Communications

The Committee received the following communications from the Department of Health and Human Services and the Department of Justice. (Attachments accompanying Department of Health and Human Services correspondence is on file with the Select Indian Affairs Committee).

The Secretary of Health and Human Services,
Washington, DC, February 24, 1987.

Hon. Daniel K. Inouye,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: We take this opportunity to inform you of the Department's views on S. 142, the "Native American Programs Amendments of 1987", as ordered reported by your Committee on January 23, 1987.

In summary, while we cannot support the bill as ordered reported, we are encouraged by the modifications the Committee has made in the bill as introduced, and would not object to the bill if it were further modified to meet the concerns raised in the report. We greatly appreciate the opportunity we have had to work with the Committee to try to develop a bill acceptable to both the Congress and the Administration, and hope that this goal can be achieved.

S. 142 would extend authorizations of appropriations for programs under the Native American Programs Act of 1974 (the Act) through FY 1991, would add requirements concerning the grant application process and use of formal rulemaking, and would authorize the provision of financial assistance to agencies serving Native American Pacific Islanders (including American Samoan Natives).

As you know, the President vetoed H.R. 3247, the 99th Congress bill to extend programs under the Act, because of serious concerns with amendments contained in that bill concerning the grants application process and the use of formal rulemaking. Those amendments would have undermined the administrative flexibility needed to carry out effectively the programs under the Act. S. 142 contains modifications that meet some of the Administration's objections, but serious concerns remain.

Section 2 of the bill makes amendments concerning the grant application review process. This section, as ordered reported, meets our objections to the corresponding provision in the vetoed bill. Specifically, references to "review panels" have been substituted for earlier "peer review panels", thus allowing for the fact that a panel of peers is not always the most appropriate reviewer of an application. Second, S. 142 would require the Secretary to report and explain final decisions on grant applications upon request of the appropriate Committee Chairmen, rather than routinely. With these modifications, we find section 2 of the bill acceptable, and we appreciate the willingness of the Committee to respond to our concerns.

The reporting requirement, as now contained in section 2 of the bill, merely restates in the Act what is already required of the Secretary by virtue of the constitutional relationship between the Executive and Legislative Branches of the Federal Government. The Committees are entitled to this information in the exercise of their legislative and oversight functions, and the Department will continue in the future to respond promptly and fully to Congressional inquiries about grant decisions. Therefore, although the provision as amended is unnecessary, we do not object to it.

Section 3 of the bill would subject programs under the Act to rulemaking requirements more burdensome than those applicable to any comparable grant program administered by this Department. This section is virtually identical to the corresponding provision of the vetoed bill: formal notice and comment rulemaking would be required for programs under the Act involving loans, grants, benefits, or contracts, and for all interpretive rules, general statements of policy, and rules of agency organization, procedure, or practice. The one difference from the vetoed bill is that this section would restore the "good cause" exception to the rulemaking requirement.

We would strongly oppose S. 142 if section 3 remains unchanged. We believe section 3 should be removed from the bill, and the Administrative Procedure Act permitted to govern. However, we have discussed with the Committee, as technical assistance, alternative language that would be acceptable to the Department. That language (a copy of which is attached) would require Federal Register publication of all regulations and general statements of policy, and of procedures having significant effect, governing the implementa-

tion of the Act; would require that all regulations or statements required as a result of enactment of any law affecting implementation of the Act be published within 180 days of enactment of such law; and would provide that no regulation or general statement so published could become effective before 30 days after publication (subject to a good cause exception).

We believe that this alternative language would meet the Congress' concerns about the process for developing major policies affecting programs under the Act, while at the same time meeting the Department's concerns that administration of the program not be unreasonably burdened by requirements for formal rulemaking on matters for which that procedure is inappropriate. In short, if language such as that we have suggested were substituted for section 3 of the bill as reported, we would not object to this provision. We consider the suggested language the minimum change required to make section 3 acceptable.

We must also express our strong opposition to section 4 of the bill, which would authorize grants under the Act to agencies serving "Native American Pacific Islanders, including American Samoans". the Act was designed to provide special assistance to members of those Native American groups, and particularly Indian tribes, which have a special relationship with the Federal Government. Extension of programs under this Act to other ethnic groups who do not enjoy this special, long-standing, constitutionally tested relationship would dilute the effectiveness of the program, is inconsistent with the purposes of the Act, and sets an undesirable precedent that is adverse to the interests of Native Americans. In addition, this provision is unnecessary, because agencies serving Native American Pacific Islanders are already eligible to apply for assistance under a variety of local, State, and Federal programs. We also object to the bill's provisions of a new special earmarked authorization for grants to Pacific Islanders.

Section 4 represents a major new policy which could set a very undesirable precedent for other Federal progrms beyond those for Native Americans. The Justice Department has advised us that extension of the programs under the Act to American Samoans and other Pacific Islanders raises constitutional issues. In summary, both the Department and the Administration have consistently opposed dilution of Native American programs by adding ethnic groups who lack a special relationship with the Federal Government, and therefore strongly oppose section 4 of the bill.

In conclusion, we would not object to S. 142, if modified to meet the concerns raised in this report. We look forward to continuing to work with the Committee to achieve a bill that is fully satisfactory both to the Congress and to the Administration.

The Office of Management and Budget has advised that there is no objection to the presentation of this report, and that enactment of S. 142 as ordered reported would not be in accord with the program of the President.

Sincerely,

OTIS R. BOWEN, M.D.,
Secretary.

Enclosure.

REQUIREMENT FOR PUBLICATION OF REGULATIONS AND OTHER GENERAL STATEMENTS

SEC. 814 (a) In addition to requirements for the promulgation of regulations contained in any other provisions of this Act, the Secretary shall publish in the Federal Register, and keep current, all regulations and general statements of major policy, and of procedures having significant effect, that govern the implementation of this title.

(b) If, as a result of the enactment of any law affecting the implementation of this title, it is necessary or appropriate for the Secretary to issue any regulation, or publish a general statement, the Secretary shall issue such regulation or publish such statement not later than 180 days after the date of enactment of such law.

((c) No such regulation or general statement published after the date of enactment of the Native American Programs Amendments of 1987 shall become effective until 30 days after the date upon which it is so published except as otherwise provided by the Secretary for good cause found and published with such regulation or statement.

THE SECRETARY OF HEALTH AND HUMAN SERVICES,
Washington, DC, July 29, 1987.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: On February 24, the Department informed the Committee of our views on S. 142, a bill to extend and amend programs under the Native American Program Act of 1974 (the Act), as ordered reported by your Committee on January 23, 1987. Subsequently, in working with the House Committee on Education and Labor on H.R. 1451, the House bill amending the Act, we modified our views on provisions of the bill concerning rulemaking under the Act (which are similar to the corresponding provisions of S. 142). We take this opportunity to inform you of these concerns.

Section 3 of S. 142 would add to the Act a new section 814, which would establish various requirements applicable to rulemaking affecting activities under the Act.

a. Exceptions under 5 U.S.C. 553(a)

Paragraph (2) of 5 U.S.C. 553(a) provides a general exception (in the case of matters relating to agency management, personnel, public property, loans, grants, benefits, or contracts) to the requirement to afford an opportunity for public comment prior to rulemaking. Proposed section 814(a) would make this exception inapplicable to programs providing loans, grants, benefits, or contracts under the Act.

As a practical matter, the proposed amendment would make no substantive change in the requirements currently applicable to activities under the Act, since the Department has voluntarily waived the exception in 5 U.S.C. 553(a)(2). (A copy of the notice of the waiver, published at 36 Federal Register 2532, February 5, 1971, is enclosed for your convenience. The only substantive effect of the amendment would be to ensure that the section 553(a)(2) ex-

ception remained inapplicable to the programs under the Act, absent a legislative change, if the Department at some future date were to modify or withdraw its waiver of the exception.

While as a matter of general Department policy we do not favor an amendment that would limit our flexibility to withdraw or modify our waiver of this exception, we would not oppose this amendment, since it will make no substantive change in current operation of the programs under the Act.

b. Rules applicable to the Act or to its administration.

Before discussing the remainder of proposed section 814 of the Act, we must note a serious but, we believe, unintended problem with the bill as drafted. Proposed section 814(b) through (f) would apply, not only to rules proposed under the authority of the Act, but also to all rules applicable to the Act or affecting the administration of the Act. The amendments would thus apply to innumerable Department-wide and Government-wide rules of general applicability pertaining to such matters as grants management, agency administration, and personnel. The effect of these amendments would be to stand the regulatory process on its head: the test of whether a given Government-wide rule was subject to a notice and comment exception, or to certain timetables concerning dates of publication and effectiveness, would be whether the rule happened to apply to the Native American Programs Act of 1974 (or to the agency administering the Act). We believe that this result was unintended. We urge the Committee, if this is the case, to revise the bill to eliminate objections by this Department, as well as objections that would surely be voiced by other Executive Branch agencies, such as the Office of Personnel Management and the General Services Administration. We will assume, for purposes of discussion in the remainder of this bill report, that the provisions of proposed section 814(b) through (f) apply only to rules proposed under the Act.

c. Exceptions under 5 U.S.C 553(b)

Subparagraph (A) of 5 U.S.C. 553(b) provides an exception to the requirement for notice and public comment in the case of interpretative rules, general statements of policy, and rules of agency organization, procedure, or practice. Proposed section 814(b) would make this exception inapplicable to any rule proposed under the Act.

We would not object to elimination, with respect to rules proposed under the Act, of the exceptions for interpretative rules and for general statements of policy. However, we oppose elimination of the exception with respect to rules of agency organizations, procedure, or practice. Absent this exception, the Department would be required to provide notice and opportunity for public comment on rules concerned exclusively with the internal organization and management of the Administration for Native Americans. We believe such a requirement would be both inappropriate and wasteful of both time and resources.

For the foregoing reasons, we strongly oppose section 3 of the bill as currently drafted. We believe section 3 should be removed from the bill, and the Administrative Procedure Act permitted to

govern. However, we would not oppose this section if amended to meet the objections stated above. We believe that section 3, amended in accordance with the above recommendations, would meet the Congress' concerns about the process for developing major policies affecting programs under the Act, while at the same time meeting the Department's concerns that administration of the program not be unreasonably burdened by requirements for formal rulemaking on matters for which that procedure is inappropriate. Enclosed for your information is a markup of section 3 indicating the changes that would be needed to meet our concerns.

The Department's views on the remainder of S. 142 are unchanged from our report of February 24. We appreciate the opportunity we have had to work with the Committee try to develop a bill acceptable to both the Congress and the Administration, and hope that this goal can be achieved.

The Office of Management and Budget has advised that there is no objection to the presentation of this report, and that enactment of S. 142 as ordered reported would not be in accord with the program of the President.

Sincerely,

OTIS R. BOWEN, M.D.,
Secretary.

Enclosures.

U.S. DEPARTMENT OF JUSTICE,
OFFICE OF LEGISLATIVE AND INTERGOVERNMENTAL AFFAIRS,
Washington, DC, April 8, 1987.

Hon. DANIEL K. INOUYE,
Chairman, Select Committee on Indian Affairs,
U.S. Senate, Washington, DC.

DEAR MR. CHAIRMAN: This responds to your request for the views of the Department of Justice on S. 142. The bill raises three potential difficulties. First, the bill would extend for five more years the authorization of appropriations under the Native American Programs Act of 1974 (the "Act"). The Act provides: "There are authorized to be appropriated for the purpose of carrying out the provisions of this subchapter, such sums as may be necessary for fiscal years 1979 through 1986." 42 U.S.C. 2992d(a). S. 142 would amend this section by replacing "1979 through 1986" with "1987, 1988, 1989, 1990, and 1991."

The Act authorizes the Secretary of Health and Human Services "to provide financial assistance to public and nonprofit private agencies . . . for projects pertaining to the purposes of this subchapter." 42 U.S.C. 2991b(a). Under 42 U.S.C. 2991a, "[t]he purpose of this subchapter is to promote the goal of economic and social self-sufficiency for American Indians, Hawaiian Natives and Alaskan Natives."

To the extent that the Act provides funding only for projects that benefit particular racial groups, it raises serious questions under the equal protection component of the fifth amendment.[1] While

[1] This, of course, assumes that the implied equal protection component of the fifth amendment, see *Bolling* v. *Sharp*, 347 U.S. 497 (1954), would prohibit all federal action that would violate the fourteenth amendment if taken by a State. But see *Hampton* v. *Mow Sun Wond*, 426 U.S. 88, 103, 105 (1976), and compare *Mathews* v. *Diaz*, 426 U.S. 67 (1976) (upholding Congress' denial of Medicare benefits to certain aliens), with *Graham* v. *Richardson*, 403 U.S. 365 (1971) (invalidating state denial of welfare benefits to aliens).

there is at least one case suggesting greater tolerance for tribal, rather than racial, classifications, see *Morton* v. *Mancari*, 417 U.S. 535, 553 n.24, 554 (1974) (upholding federal preference "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities"), nothing in the Act relies on a tribal classification. In fact, the Act rejects any such limitation on the preferences it grants: "Every determination made with respect to a request for financial assistance under this section shall be made without regard to whether the agency making such request serves, or the project to be assisted is for the benefit of, Indians who are not members of a federally recognized tribe." 42 U.S.C. 2991b.

The use of racial classifications in the absence of any showing of past governmental discrimination against the individuals benefited or that these classifications are "narrowly tailored" toward remedying that discrimination can be seriously questioned. Given the serious constitutional questions posed, we oppose extending the Act's authorization for appropriations to finance such racial preferences.

Second, S. 142 would amend the Act by adding a new section 806. That section would establish a formal panel review process to evaluate the relative merits of applications for financial assistance under the Act. Section 806 authorizes the Secretary to appoint the members of review panels with the following direction: "In making appointments to such panels, the Secretary shall give preference to American Indians, Hawaiian Natives, and Alaskan Natives."

The direction to employ racial preferences in constituting the review panels raises additional equal protection concerns. As noted, in *Morton* v. *Mancari*, 417 U.S. 535 (1974), the Supreme Court upheld a federal statute giving members of federally recognized Indian tribes preference for employment with the Bureau of Indian Affairs. According to the Court:

> The preference, as applied, is granted to Indians not as a discrete racial group, but rather as members of quasisovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion. In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *sui generis*. Furthermore, the preference applies only to employment in the Indian service. The preference does not cover any other Government agency or activity, and we need not consider the obviously more difficult question that would be presented by a blanket exemption for Indians from all civil service examinations. Here, the preference is reasonably and directly related to a legitimate, nonracially based goal. The principal characteristic that generally is absent from proscribed forms of racial discrimination.

417 U.S. at 534.

Because the review panel preference is based on race, it presents "the obviously more difficult question" reserved in *Manacri*. Again, there is no indication that the preference can be viewed as "related

to a legitimate, nonracially based goal." The department must oppose the use of racial preferences which serve no purpose other than to favor some races over others.

Third, S. 142 would extend the Act's preferences to "Native American Pacific Islanders." Adding this racial group to the list of those singled out for special treatment only exacerbates the equal protection problems outlined above. Clearly, the Supreme Court's discussion of "the unique status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status," *Mancari,* 417 U.S. at 551, has no relevance to this proposed extension.

For the foregoing reasons, the Department of Justice opoposes the enactment of S. 142.

Sincerely,

JOHN R. BOLTON,
Assistant Attorney General.

CHANGES IN EXISTING LAW

In compliance with subsection 12 of rule XXVI of the Standing Rules of the Senate, the Committee notes the following changes in existing law (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no changes are proposed is shown in roman):

NATIVE AMERICAN PROGRAM ACT OF 1974

* * * * * * *

SEC. 802. The purpose of this title is to promote the goal of economic and social self-sufficiency for American Indians, Hawaiian Natives, *Native American Pacific Islanders (including American Samoan Natives)* and Alaskan Natives.

SEC. 803. (a) The Secretary is authorized to provide financial assistance, *on a single year or multiyear basis,* to public and nonprofit private agencies, including but not limited to, governing bodies of Indian tribes on Federal and State reservations, Alaskan Native villages and regional corporations established by the Alaska Native Claims Settlement Act, and such public and nonprofit private agencies serving Hawaiian Natives, and Indian organizations in urban or rural nonreservation areas, for projects pertaining to the purposes of this title. *The Secretary is authorized, subject to the availability of funds appropriated under the authority of section 816(c), to provide financial assistance to public and nonprofit private agencies serving Native American Pacific Islanders (including American Samoan Natives) for projects pertaining to the purposes of this Act.* In determining the projects to be assisted under this title, the Secretary shall consult with other Federal agencies for the purpose of eliminating duplication or conflict among similar activities or projects and for the purpose of determining whether the findings resulted from those projects may be incorporated into one or more programs for which those agencies are responsible. Every determination made with respect to a request for financial assistance under this section shall be made without regard to whether the agency making such request serves, or the project to be assisted is for the benefit of, Indians who are not members of a federally rec-

ognized tribe. To the greatest extent practicable, the Secretary shall ensure that each project to be assisted under this title is consistent with the priorities established by the agency which receives such assistance.

* * * * * * *

LOAN FUND; DEMONSTRATION PROJECT

SEC. 803A. (a)(1) In order to provide funding that is not available from private sources, the Secretary, acting through an appropriate State agency, or a community-based Native Hawaiian organization whose purpose is economic and social self-sufficiency, shall establish and carry out, in the State of Hawaii, a 60-month demonstration project involving the establishment of a revolving loan fund—

(A) from which the Secretary, acting through such agency or community-based Native Hawaiian organization, shall make loans to Native Hawaiian organizations and to individual Native Hawaiians for the purpose of promoting economic development,

(B) into which all payments, interest, charges, and other amounts collected from loans made under subparagraph (A) shall, notwithstanding any other provision of law, be deposited.

(2) The Secretary may make loans under paragraph (1)(A) only if the Secretary determines that—

(A) the borrower is unable to obtain financing from other sources on reasonable terms and conditions, and

(B) there is a reasonable prospect that the borrower will be able to repay the loan.

(3)(A) Loans made under paragraph (1)(A) shall be—

(i) for a term that does not exceed 5 years, and

(ii) at a rate of interest determined by the Secretary of the Treasury on the basis of the market yield on municipal bonds at the time the loan is made.

(B) Notwithstanding subparagraph (A)(ii), the rate of interest on loans made under paragraph (1)(A) shall not exceed the average yield on marketable obligations of the United States of comparable maturity that are outstanding at the time the loan is made.

(4) The Secretary is authorized to require any borrower of a loan under paragraph (1)(A) to provide such collateral as the Secretary determines to be necessary to secure the loan.

(5)(A) The Secretary may cancel, adjust, compromise, or reduce the amount of any loan made under paragraph (1)(A), or release or subordinate any collateral securing payment of such amount, if the Secretary determines that—

(i) such amount is uncollectable or collectable only at an unreasonable cost, or

(ii) such action would be in the best interests of the United States.

(6) The Secretary, out of funds available in the revolving loan fund established under paragraph (1), shall—

(A) pay expenses incurred by the Secretary in administering the revolving loan fund, and

(B) provide competent management and technical assistance to borrowers for loans made under paragraph (1)(A) to assist the borrower in meeting the objectives of the loan.

(7) The Secretary, in consultation with such State agency or community-based Native Hawaiian organization, shall prescribe regulations which set forth the procedures and criteria to be used in making loans under paragraph (1)(A). The Secretary is authorized to prescribe such other regulations as may be necessary to carry out the purposes of this subsection, including regulations involving reporting and auditing.

(8) No loan shall be made from the fund upon the expiration of the 60-month period following the date of the enactment of this Act.

(9)(A) Notwithstanding any other provision of this Act, there is authorized to be appropriated to the fund established pursuant to this section the sum of $3,000,000, to remain available until expended.

(B) Moneys in the fund shall be available for expenditure by the Secretary without fiscal year limitation for the purpose of carrying out the provisions of this title.

(10) All moneys in the fund following the termination of the demonstration project under this section, not otherwise needed, as determined by the Secretary, to carry out this section, shall be deposited in the Treasury of the United States as miscellaneous receipts. All amounts thereafter deposited in the fund pursuant to subsection (a)(1)(B) of this section following such termination shall be transferred to the Treasury as miscellaneous receipts.

(b) On or before the expiration of the 48-month period following the date of the enactment of this section, the Secretary, in consultation with the State agency or contracting community-based Native Hawaiian organization referred to in paragraph (1) of subsection (a) of this section, shall report to the Congress concerning the administration of this section, together with the views and recommendations of the Secretary as to the effectiveness of the demonstration program, and whether it should be expanded to other groups eligible for assistance under this section, and extended.

PANEL REVIEW OF APPLICATIONS FOR ASSISTANCE

SEC. 806. (a)(1) The Secretary shall establish a formal panel review process for purposes of—

(A) evaluating applications for financial assistance under sections 803 and 805, and

(B) determining the relative merits of the projects for which such assistance is requested.

(2) Members of review panels established under paragraph (1) shall be appointed by the Secretary from among individuals who are not officers or employees of the Administration of Native Americans. In making appointments to such panels, the Secretary shall give preference to American Indians, Hawaiian Natives, Native American Pacific Islanders (including American Samoan Natives), and Alaskan Natives.

(b) Each review panel established under subsection (a)(1) that reviews any application for financial assistance shall—

(1) determine the merit of each project described in such application;

(2) rank such application with respect to all other applications it reviews for the fiscal year involved, according to the relative merit of all of the projects that are described in such application and for which financial assistance is requested; and

(3) submit to the Secretary a list that identifies all applications reviewed by such panel and arranges such applications according to rank determined under paragraph (2).

(c) Upon the request of the chairman of the Select Committee on Indian Affairs of the Senate or of the chairman of the Committee on Education and Labor of the House of Representatives made with respect to any application for financial assistance under section 803 or 805, the Secretary shall transmit to the chairman written notice—

(1) containing a copy of the list submitted to the Secretary under subsection (b)(3) in which such application is ranked;

(2) specifying which other applications ranked in such list have been approved by the Secretary under sections 803 and 805; and

(3) if the Secretary has not approved each application superior in merit, as indicated on such list, to the application with respect to which such notice is transmitted, containing a statement of the reasons relied upon by the Secretary for—

(A) Approving the application with respect to which such notice is transmitted; and

(B) failing to approve each pending application that is superior in merit, as indicated on such list, to the application described in subparagraph (A).

ANNOUNCEMENT OF RESEARCH, DEMONSTRATION, OR PILOT PROJECTS

SEC. [806.] *807.* (a) The Secretary shall make a public announcement concerning—

(1) the title, purpose, intended completion date, identity of the grantee or contractor, and proposed cost of any grant or contract with a private or non-Federal public agency for a research, demonstration, or pilot project; and

(2) except in cases in which the Secretary determines that it would not be consistent with the purposes of this title, the results, findings, data, or recommendations made or reported as a result of such activities.

(b) The public announcements required by subsection (a) shall be made within thirty days of making such grants or contracts, and the public announcements required by subsection (b) of this section shall be made thirty days of the receipt of such results.

SUBMISSION OF PLANS TO STATE AND LOCAL OFFICIALS

SEC. [807.] *808.* (a) No financial assistance may be provided to any project under section 803 of this title or any research, demonstration, or pilot project under section 805 of this title, which is to be carried out on or in an Indian reservation or Alaskan Native village, unless a plan setting forth the project has been submitted to the governing body of that reservation or village and the plan

has not been disapproved by the governing body within thirty days of its submission.

(b) No financial assistance may be provided to any project under section 803 of this title or any research, demonstration, or pilot project under section 805 of this title, which is to be carried out in a State *or Territory* other than on or in an Indian reservation or Alaskan Native village or Hawaiian Homestead, unless the Secretary has notified the chief executive officer of the State *or Territory* of the decision of the Secretary to provide that assistance.

(c) No financial assistance may be provided to any project under section 803 of this title or any research, demonstration, or pilot project under section 805 of this title, which is to be carried out in a city, country, or other major political subdivision of a State *or Territory,* other than on or in an Indian reservation or Alaskan Native village, or Hawaiian Homestead, unless the Secretary has notified the local governing officials of the political subdivision of the decision of the Secretary to provide that assistance.

RECORDS AND AUDITS

SEC. [808.] *809.* (a) Each agency which receives financial assistance under this title shall keep such records as the Secretary may prescribe, including records which fully disclose the amount and disposition by that agency of such financial assistance, the total cost of the project in connection with which such financial assistance is given or used, the amount of that portion of the cost of the project supplied by other sources, and such other records as will facilitate an effective audit.

(b) The Secretary and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access for the prupose of audit and examination to any books, documents, papers, and records of any agency which receives financial assistance under this title that are pertinent to the financial assistance received under this title.

APPEALS, NOTICE, AND HEARING

SEC. [809.] *810.* The Secretary shall prescribe procedures to assure that—

(1) financial assistance under this title shall not be suspended, except in emergency situations, unless the assisted agency has been given reasonable notice and opportunity to show cause why such action should not be taken; and

(2) financial assistance under this title shall not be terminated, and application for refunding shall not be denied, and a suspension of financial assistance shall not be continued for longer than thirty days, unless the assisted agency has been afforded reasonable notice and opportunity for a full and fair hearing.

EVALUATION

SEC. [810.] *811.* (a) The Secretary shall provide, directly or through grants or contracts, for the evaluation of projects assisted under this title, including evaluations that describe and measure the impact of such projects, their effectiveness in achieving stated

goals, their impact on related programs, and their structure and mechanisms for delivery of services, including, where appropriate, comparisons with appropriate control groups composed of persons who have not participated in such projects. Evaluation shall be conducted by persons not directly involved in the administration of the program or project evaluated.

(b) Prior to obligating funds for the programs and projects covered by this title with respect to fiscal year 1976, the Secretary shall develop and publish general standards for evaluation of program and project effectiveness in achieving the objectives of this title. The extent to which such standards have been met shall be considered in deciding whether to renew or supplement financial assistance authorized under this title.

(c) In carrying out evaluations under this title, the Secretary may require agencies which receive assistance under this title to provide for independent evaluations.

(d) In carrying out evaluations under this title, the Secretary shall, whenever feasible, arrange to obtain the specific views of persons participating in and served by programs and projects assisted under this title about such programs and projects.

(e) The Secretary shall publish the results of evaluative research and summaries of evaluations of program and project impact, and effectiveness not later than ninety days after the completion thereof. The Secretary shall submit to the appropriate committees of the Congress copies of all such research studies and evaluation summaries.

(f) The Secretary shall shall take the necessary action to assure that all studies, evaluations, proposals, and data produced or developed with assistance under this title shall become the property of the United States.

LABOR STANDARD

SEC. [811.] *812.* All laborers and mechanics employed by contractors or subcontractors in the construction, alteration, or repair, including painting or decorating, of buildings or other facilities in connection with projects assisted under this title, shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act. The Secretary of Labor shall have, with respect to such labor standards, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950, and section 2 of the Act of June 1, 1934.

ADMINISTRATION; DELEGATION OF AUTHORITY

SEC. [812.] *813.* (a)(1) The general administration of the programs authorized by this Act shall remain within the Department of Health and Human Services and, notwithstanding any authority under any other law, may not be transferred outside of such Department.

(2) The Secretary shall continue to administer grants under section 803 through the Administration for Native Americans. The Commissioner of such Administration may not delegate outside of

the Administration the functions, powers, and duties of the Commissioner to carry out such section.

(b)(1) Except as provided in subsection (a)(2), the Secretary may delegate only to the heads of agencies within the Department of Health and Human Services any of the functions, powers, and duties of the Secretary under this title and may authorize the redelegation only within such Department of such functions, powers and duties by the heads of such agencies.

(2) Funds appropriated to carry out this title, other than section 803, may be transferred between such agencies if such funds are used for the purpose for which they were authorized and appropriated.

(c) Nothing in this section shall be construed to prohibit interagency funding agreements made between the Administration for Native Americans and other agencies of the Federal Government for the development and implementation of specific grants or projects.

ADDITIONAL REQUIREMENTS APPLICABLE TO RULE MAKING

SEC. 814. (a) Notwithstanding subsection (a) of section 553 of title 5, United States Code, and except as otherwise provided in this section, such section 553 shall apply with respect to the establishment and general operation of any program that provides loans, grants, benefits, or contracts authorized by this title.

(b) The exception provided in subparagraph (A) of the last sentence of section 553(b) of title 5, United States Code shall not apply with respect to any rule (including any general statement of policy) that is—

(1) proposed under this title;

(2) applicable exclusively to any program, project or activity authorized by, or carried out under, this title; or

(3) applicable to the organization, procedure, or practice of an agency (as defined in section 551(1) of title 5, United States Code) and that would solely affect the administration of this title.

(c) The exceptions provided by paragraphs (1) and (2) of section 553(d) of title 5, United States Code, shall not apply to any rule (or general statement of policy) that—

(1) is issued to carry out this title;

(2) applies exclusively to any program project, or activity authorized by, or carried out under, this title; or

(3) is applicable to the organization, procedure, or practice of an agency (as defined in section 551(1) of title 5, United States Code) and that will solely affect the administration of this title.

(d) Each rule to which this section applies shall contain after each of its sections, paragraphs, or similar textual units a citation to the particular provision of statutory or other law that is the legal authority for such section, paragraph, or unit.

(e) Except as provided in subsection (c), if as a result of the enactment of any law affecting the administration of this title it is necessary or appropriate for the Secretary to issue any rule, the Secretary shall issue such rule not later than 180 days after the date of the enactment of such law.

(f) Whenever an agency publishes in the Federal Register a rule (including a general statement of policy) to which subsection (c) applies, such agency shall transmit a copy of such rule to the Select Committee on Indian Affairs of the Senate and to the Committee on Education and Labor of the House of Representatives.

DEFINITIONS

SEC. [813.] *815.* As used in this title, the term—

(1) "financial assistance" includes assistance advanced by grant, agreement, or contract, but does not include the procurement of plant or equipment, or goods or services;

(2) "Indian reservation of Alaskan Native village" includes the reservation of any federally or State recognized Indian tribe, including any band, nation, pueblo, or rancheria, any former reservation in Oklahoma, any community under the jurisdiction of an Indian tribe, including a band, nation, pueblo, or rancheria, with allotted lands or lands subject to a restriction against alienation imposed by the United States or any State, and any lands of or under the jurisdiction of an Alaskan Native village or group, including any lands selected by Alaskan Natives or Alaskan Natives organizations under the Alaska Native Claims Settlement Act;

(3) "Native Hawaiians" means any individual any of whose ancestors were natives of the area which consists of the Hawaiian Islands prior to 1778; [and]

(4) the term "rule" has the meaning given it in section 551(4) of title 5, United Code, as amended from time to time; and

[(4)]*(5)* "Secretary" means the Secretary of Health and Human Services.

AUTHORIZATION OF APPROPRIATIONS

SEC. [814] *816.* (a) There are authorized to be appropriated for the purpose of carrying out the provisions of this title, such sums as may be necessary for fiscal years [1979 through 1986.] *1987, 1988, 1989, 1990, and 1991.*

(b) Not less than 90 per centum of the funds made available to carry out the provisions of this title for a fiscal year shall be expended to carry out section 803(a) for such fiscal year.

(c) There are authorized to be appropriated $500,000 for each of the fiscal years 1987, 1988, 1989, 1990, and 1991 for the purpose of providing financial assistance to Native American Pacific Islanders (including American Samoan Natives) under section 803(a).

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